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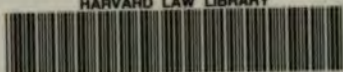
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VOL. 65—INDIANA REPORTS.

| | | | | | | | | | | | | | |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 65 | 17 | 65 | 73 | 65 | 106 | 65 | 243 | 65 | 326 | 65 | 427 | 65 | 526 |
| 76 | 129 | 67 | 52 | 68 | 61 | 95 | 531 | 73 | 80 | 70 | 472 | 74 | 444 |
| 80 | 354 | 67 | 265 | 68 | 181 | 95 | 550 | 79 | 415 | 73 | 548 | 79 | 117 |
| 92 | 367 | 67 | 286 | 89 | 102 | 65 | 249 | 79 | 509 | 75 | 32 | 80 | 508 |
| 65 | 6 | 67 | 342 | 93 | 218 | 65 | 490 | 86 | 221 | 79 | 280 | 92 | 373 |
| 107 | 291 | 68 | 276 | 93 | 291 | 93 | 158 | 91 | 76 | 79 | 375 | 98 | 419 |
| 65 | 12 | 68 | 572 | 110 | 234 | 65 | 255 | 108 | 414 | 94 | 385 | 117 | 439 |
| 75 | 141 | 70 | 373 | 111 | 268 | 112 | 84 | 118 | 82 | 97 | 377 | 65 | 545 |
| 77 | 354 | 75 | 114 | 110 | 577 | 114 | 405 | 65 | 329 | 100 | 109 | 68 | 218 |
| 79 | 157 | 76 | 102 | 65 | 113 | 117 | 41 | 67 | 516 | 101 | 169 | 73 | 484 |
| 82 | 31 | 76 | 202 | 65 | 113 | 65 | 292 | 77 | 580 | 103 | 581 | 118 | 116 |
| 84 | 219 | 76 | 512 | 69 | 273 | 93 | 408 | 81 | 293 | 105 | 185 | 65 | 549 |
| 92 | 431 | 76 | 521 | 65 | 117 | 99 | 51 | 83 | 296 | 107 | 28 | 68 | 353 |
| 97 | 409 | 77 | 212 | 84 | 306 | 106 | 451 | 84 | 227 | 109 | 141 | 102 | 271 |
| 115 | 133 | 78 | 179 | 65 | 130 | 65 | 269 | 65 | 332 | 65 | 445 | 65 | 561 |
| 65 | 25 | 79 | 154 | 70 | 416 | 88 | 576 | 66 | 291 | 69 | 336 | 65 | 152 |
| 77 | 223 | 79 | 423 | 77 | 345 | 65 | 277 | 70 | 176 | 70 | 364 | 65 | 152 |
| 81 | 213 | 80 | 362 | 89 | 316 | 67 | 317 | 75 | 139 | 86 | 17 | 65 | 565 |
| 81 | 469 | 80 | 570 | 65 | 132 | 80 | 292 | 82 | 480 | 89 | 13 | 70 | 345 |
| 84 | 346 | 81 | 207 | 74 | 219 | 81 | 517 | 94 | 540 | 89 | 198 | 76 | 218 |
| 96 | 206 | 82 | 49 | 65 | 146 | 87 | 515 | 65 | 345 | 89 | 547 | 87 | 154 |
| 99 | 362 | 82 | 356 | 78 | 237 | 88 | 143 | 65 | 238 | 94 | 13 | 93 | 343 |
| 65 | 27 | 82 | 535 | 82 | 60 | 91 | 182 | 83 | 56 | 106 | 61 | 94 | 221 |
| 81 | 453 | 83 | 436 | 84 | 430 | 94 | 69 | 86 | 201 | 113 | 562 | 96 | 20 |
| 83 | 241 | 84 | 243 | 85 | 311 | 65 | 282 | 97 | 516 | 114 | 370 | 102 | 251 |
| 93 | 229 | 84 | 445 | 65 | 153 | 66 | 226 | 98 | 379 | 115 | 68 | 110 | 488 |
| 109 | 496 | 85 | 396 | 84 | 480 | 85 | 557 | 100 | 103 | 115 | 73 | 123 | 132 |
| 65 | 29 | 85 | 602 | 101 | 358 | 99 | 368 | 106 | 557 | 65 | 490 | 65 | 576 |
| 70 | 33 | 86 | 462 | 65 | 171 | 65 | 288 | 111 | 63 | 69 | 277 | 75 | 530 |
| 65 | 39 | 86 | 466 | 70 | 284 | 82 | 198 | 65 | 267 | 65 | 463 | 75 | 578 |
| 72 | 435 | 87 | 24 | 76 | 360 | 96 | 79 | 80 | 210 | 68 | 198 | 86 | 139 |
| 65 | 47 | 87 | 96 | 82 | 94 | 115 | 126 | 92 | 130 | 74 | 477 | 93 | 573 |
| 66 | 24 | 88 | 302 | 87 | 153 | 65 | 302 | 65 | 377 | 74 | 582 | 110 | 554 |
| 68 | 482 | 90 | 402 | 118 | 81 | 65 | 181 | 65 | 405 | 75 | 151 | 65 | 582 |
| 65 | 51 | 91 | 122 | 65 | 176 | 80 | 103 | 68 | 405 | 108 | 72 | 69 | 356 |
| 67 | 69 | 92 | 149 | 65 | 580 | 96 | 116 | 73 | 251 | 65 | 468 | 76 | 83 |
| 68 | 275 | 92 | 407 | 81 | 140 | 103 | 525 | 87 | 421 | 113 | 192 | 97 | 154 |
| 68 | 571 | 92 | 419 | 96 | 115 | 65 | 308 | 90 | 432 | 116 | 512 | 120 | 246 |
| 65 | 56 | 93 | 107 | 103 | 497 | 70 | 10 | 105 | 323 | 130 | 15 | 65 | 591 |
| 65 | 211 | 95 | 134 | 65 | 188 | 72 | 349 | 65 | 382 | 65 | 474 | 74 | 268 |
| 69 | 462 | 95 | 242 | 89 | 472 | 80 | 62 | 101 | 243 | 101 | 162 | 77 | 120 |
| 121 | 293 | 97 | 46 | 94 | 288 | 80 | 290 | 65 | 393 | 101 | 346 | 93 | 486 |
| 65 | 60 | 99 | 33 | 65 | 196 | 84 | 332 | 81 | 558 | 65 | 482 | 98 | 341 |
| 75 | 138 | 102 | 578 | 73 | 232 | 87 | 222 | 99 | 296 | 65 | 489 | 101 | 508 |
| 99 | 461 | 105 | 268 | 65 | 204 | 88 | 445 | 100 | 490 | 68 | 469 | 101 | 508 |
| 65 | 65 | 106 | 46 | 65 | 270 | 89 | 530 | 109 | 148 | 71 | 279 | 122 | 34 |
| 85 | 192 | 112 | 440 | 74 | 338 | 95 | 476 | 65 | 398 | 78 | 385 | 65 | 595 |
| 65 | 70 | 113 | 161 | 85 | 100 | 96 | 587 | 65 | 565 | 93 | 321 | 67 | 485 |
| 85 | 25 | 115 | 161 | 94 | 15 | 101 | 44 | 87 | 572 | 101 | 384 | 80 | 416 |
| | | 65 | 78 | 108 | 180 | 107 | 532 | 119 | 508 | 107 | 546 | 95 | 173 |
| | | 86 | 231 | 65 | 209 | 109 | 225 | 65 | 409 | 65 | 488 | | |
| | | 91 | 468 | 87 | 37 | 109 | 436 | 74 | 370 | 84 | 143 | | |
| | | 65 | 83 | 121 | 293 | 65 | 313 | 65 | 413 | 65 | 492 | | |
| | | 85 | 600 | 65 | 213 | 66 | 51 | 67 | 512 | 66 | 600 | | |
| | | 65 | 92 | 85 | 508 | 70 | 377 | 70 | 196 | 76 | 552 | | |
| | | 77 | 165 | 91 | 235 | 73 | 469 | 74 | 294 | 101 | 338 | | |
| | | 87 | 32 | 106 | 277 | 78 | 533 | 78 | 486 | 109 | 78 | | |
| | | 65 | 94 | 65 | 222 | 79 | 416 | 87 | 176 | 65 | 504 | | |
| | | 66 | 604 | 84 | 88 | 79 | 509 | 107 | 359 | 74 | 344 | | |
| | | 69 | 6 | 65 | 220 | 90 | 579 | 113 | 92 | 88 | 5 | | |
| | | 70 | 138 | 79 | 247 | 108 | 414 | 118 | 231 | 110 | 309 | | |
| | | 75 | 260 | 83 | 435 | 118 | 82 | 65 | 421 | 65 | 512 | | |
| | | 87 | 10 | 120 | 546 | 120 | 343 | 109 | 232 | 80 | 354 | | |
| | | 117 | 519 | 65 | 234 | 114 | 399 | 114 | 204 | 80 | 465 | | |
| | | 65 | 100 | 82 | 61 | 65 | 317 | 121 | 537 | 87 | 207 | | |
| | | 93 | 331 | 101 | 491 | 65 | 321 | | | 90 | 10 | | |
| | | 99 | 86 | 65 | 239 | 111 | 169 | | | 123 | 108 | | |
| | | 100 | 515 | 77 | 65 | | | | | 65 | 522 | | |
| | | 107 | 161 | | | | | | | 81 | 50 | | |
| | | | | | | | | | | 100 | 166 | | |

14
Sept 29

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By AUGUSTUS N. MARTIN,
OFFICIAL REPORTER.

VOL. LXV.,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1878,
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TABLE OF THE CASES

REPORTED IN THIS VOLUME.

| | | | |
|--|-----|---|-----|
| Adams v. The State..... | 565 | Carter et al. v. Harter..... | 37 |
| Adams, The State, ex rel. Julian, v..... | 393 | Case v. Fowler..... | 29 |
| Adams Express Co., Monroe v..... | 60 | Catherwood v. Watson..... | 576 |
| Albert, Cashier of the Bank of Paoli, et al. v. The State, ex rel. | | Charles, Adm'r, et al. v. Malott..... | 184 |
| Atkinson, Adm'r, et al..... | 413 | City of Crawfordsville v. Barr..... | 367 |
| Allen et al. v. Marney..... | 898 | Clements, Hyatt v..... | 12 |
| Allen et ux., Atherton v..... | 240 | Cogswell et al. v. The State, ex rel. Albert, Guardian..... | 1 |
| Anderson et al. v. Anderson..... | 196 | Collier v. Waugh et al..... | 128 |
| Anderson et al., Menzie v..... | 239 | Columbus, Chicago and Indiana Central R. W. Co. v. Board of Comm'rs of Grant Co. et al..... | 427 |
| Arnold, Miller et al. v..... | 488 | Compton v. Jones et al..... | 117 |
| Atherton v. Allen et ux..... | 240 | Cox v. Bird et al..... | 277 |
| Barker, Bosworth v..... | 595 | Cranmore v. Bodine et al..... | 25 |
| Barnett, Perry v..... | 522 | Crapo, by her next Friend, Dow- ling v..... | 209 |
| Barr, City of Crawfordsville v..... | 367 | Cravens et al., Ferris et al. v..... | 262 |
| Beckner et al. v. Riverside and Battle Ground Turnpike Co..... | 468 | Crawfordsville, City of, v. Barr..... | 367 |
| Bell, Meyer et al. v..... | 83 | Crouch, Galvin v..... | 56 |
| Bell et al. v. Hobough..... | 598 | Cunningham v. The State, ex rel. Zartman..... | 877 |
| Bell et al., Bittinger v..... | 445 | Daly, John Hancock Mutual Life Ins. Co. v..... | 6 |
| Berlin v. Oglesbee et al..... | 308 | Davis, Dye et al. v..... | 474 |
| Binford, Adm'r, v. Willson..... | 70 | Dawson et al. v. The State..... | 442 |
| Bird et al., Cox v..... | 277 | Derixson v. The State..... | 385 |
| Bittinger v. Bell et al..... | 445 | Dienhart, Welshbillig et al. v..... | 94 |
| Board of Comm'rs of Daviess Co., Sturgeon et al. v..... | 302 | Dougherty et al., Schoonover v..... | 463 |
| Board of Comm'rs of Grant Co. et al., Columbus, Chicago and Indiana Central R. W. Co. v..... | 427 | Dowling v. Crapo, by her next Friend..... | 209 |
| Bodine et al., Cranmore et al. v..... | 25 | Doxey, Singer Manufacturing Co. v..... | 65 |
| Bosworth v. Barker..... | 595 | Duffy et al., Lapping et al. v..... | 229 |
| Boyd, Grand Rapids and Indiana R. R. Co. v..... | 526 | Duke v. Brown et al..... | 25 |
| Braden, Logansport, Crawfords- ville and South-Western R. W. Co. v..... | 128 | Dye et al. v. Davis..... | 474 |
| Britz et al. v. Johnson et al..... | 561 | Eden et al. v. Everson et al..... | 113 |
| Brown et al., Duke v..... | 25 | Edwards, Hogate et al. v..... | 372 |
| Brown et al., Foster, Assignee, v..... | 234 | Elder, The State v..... | 282 |
| Brubaker, Hayes et al. v..... | 27 | Elliott, Holman et al. v..... | 78 |
| Bruner et al., McGill et al. v..... | 421 | Evansville and Crawfordsville R. R. Co. v. Smith..... | 92 |
| Buck v. Steffey..... | 58 | Everson et al., Eden et al. v..... | 113 |
| Campbell v. Frankem..... | 591 | Ex Parte Laboyteaux..... | 545 |
| Cardwell et al., Franklin Life Ins. Co. of Indianapolis v..... | 138 | Ex Parte Wright..... | 504 |

| | | | |
|---|-----|---|-----|
| Ferris et al. v. Cravens et al..... | 262 | Kress et al., Ex'rs, v. The State, ex rel. Wagoner..... | 106 |
| First National Bank of Napoleon, Ohio, Lent et ux. v..... | 112 | Laboyteaux, Ex Parte..... | 545 |
| Fisher v. The State, ex rel. Wil- dermuth..... | 51 | Lapping et al. v. Duffy et al..... | 229 |
| Fisher et al. v. Freeman..... | 89 | Law, Scheible v..... | 332 |
| Fitch et al., Ex'rs, Martin v..... | 216 | Lent et ux. v. First Nat'l Bank of Napoleon, Ohio..... | 112 |
| Foresman, Treasurer, v. Johnson, Auditor..... | 132 | Lewis et al., Nye, Assignee, v..... | 326 |
| Fort Wayne, Jackson and Saginaw R. R. Co. v. Husselman..... | 73 | Logansport, Crawfordsville and South-Western R. W. Co. v. Braden..... | 128 |
| Foster, Assignee, v. Brown et al..... | 234 | Louisville, New Albany and Chi- cago R. W. Co. v. Francis..... | 39 |
| Fowler, Case v..... | 29 | Mainey, The State v..... | 404 |
| Francis, Louisville, New Albany and Chicago R. W. Co. v..... | 39 | Makepeace et al., Pence, Adm'r, v..... | 345 |
| Frankem, Campbell v..... | 691 | Mallory et al., The State, ex rel. Curran et al., v..... | 43 |
| Franklin Insurance Co. of Indian- apolis v. Humphrey et al..... | 549 | Malott, Charles, Adm'r, et al. v..... | 184 |
| Franklin Life Ins. Co. of Indian- apolis v. Cardwell et al..... | 188 | Marney, Allen et al. v..... | 398 |
| Freeman, Fisher et al. v..... | 89 | Marshall v. Stewart..... | 243 |
| Galvin v. Crouch..... | 56 | Martin v. Fitch et al., Ex'rs..... | 216 |
| Godman et al. v. Meixsel et al..... | 32 | McCabe v. Goodwine..... | 288 |
| Goodwine, McCabe v..... | 288 | McClure v. McClure..... | 482 |
| Grand Rapids and Indiana R. R. Co. v. Boyd..... | 526 | McGill et al. v. Bruner et al..... | 421 |
| Hall et al., Williams et al. v..... | 129 | McKinley et al. v. Snyder..... | 143 |
| Harter, Carter et al. v..... | 37 | Meixsel et al., Godman et al. v..... | 32 |
| Hayes et al. v. Brubaker..... | 27 | Menzie v. Anderson et al..... | 239 |
| Heaton v. Knowlton et al., Ex'rs..... | 255 | Meyer et al. v. Bell..... | 83 |
| Helphenstine v. Vincennes Nation- al Bank et al..... | 582 | Miller et al. v. Arnold..... | 488 |
| Hendrix et al. v. Hendrix, Ex'r..... | 329 | Monroe v. Adams Express Co..... | 60 |
| Hobaugh, Bell et al. v..... | 598 | Moore v. The State..... | 213 |
| Hogate et al. v. Edwards..... | 372 | Moore v. The State..... | 382 |
| Hollowell, Pittsburgh, Cincinnati and St. Louis R. W. Co. v..... | 188 | Nesbit, Williams v..... | 171 |
| Holman et al. v. Elliott..... | 78 | Nichols, Adm'r, et al. v. The State, ex rel. Clark, Trustee..... | 512 |
| Hughes et al. v. The State..... | 89 | Norris v. Tharp et al..... | 47 |
| Hulman et al., Kester et al. v..... | 100 | Nye, Assignee, v. Lewis et al..... | 326 |
| Humphrey et al., Franklin Insur- ance Co. of Indianapolis v..... | 549 | Oglesbee et al., Berlin v..... | 308 |
| Husselman, Fort Wayne, Jackson and Saginaw R. R. Co. v..... | 73 | Osborn v. Storms..... | 321 |
| Hyatt v. Clements..... | 12 | Parker et al., Sutton v..... | 536 |
| John Hancock Mutual Life Ins. Co. v. Daly..... | 6 | Patterson et al. v. Rowley..... | 108 |
| Johnson v. The State..... | 204 | Pence, Adm'r, v. Makepeace et al..... | 345 |
| Johnson v. The State..... | 269 | Perkins v. The State..... | 317 |
| Johnson, Auditor, Foresman, Treas- urer, v..... | 132 | Perry v. Barnett..... | 522 |
| Johnson et al., Britz et al. v..... | 561 | Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell..... | 188 |
| Jones et al., Compton v..... | 117 | Potts et al. v. The State, ex rel. Morgan, Guardian, et al..... | 273 |
| Kellogg et al. v. Tout et al..... | 146 | Pullman Palace Car Co. v. Taylor..... | 153 |
| Kester et al. v. Hulman et al..... | 100 | Quillen et al., Tracy v..... | 249 |
| Knowlton et al., Ex'rs, Heaton v..... | 255 | Rankin et al. v. Walker..... | 222 |
| | | Reed, Schoonover v..... | 313 |

TABLE OF CASES REPORTED.

v

| | | | |
|---|-----|---|-----|
| Ridenour v. The State..... | 411 | State, Hughes et al. v..... | 89 |
| Riverside and Battle Ground Turn- pike Co., Beckner et al. v..... | 468 | State, Johnson v..... | 204 |
| Rooker v. The State..... | 86 | State, Johnson v..... | 289 |
| Rowley, Patterson et al. v..... | 108 | State, Moore v..... | 213 |
| Rudowskey et al., The State v..... | 389 | State, Moore v..... | 382 |
| Scheible v. Law..... | 382 | State, Perkins v..... | 317 |
| Schlosser, Young v..... | 225 | State, Ridenour v..... | 411 |
| Schoonover v. Dougherty et al..... | 463 | State, Rooker v..... | 86 |
| Schoonover v. Reed..... | 313 | State, Stevenson v..... | 409 |
| Singer Manufacturing Co. v. Doxey..... | 65 | State, Vance v..... | 460 |
| Small et al., Whisnand, Adm'r, et al. v..... | 120 | Steffey, Buck v..... | 58 |
| Smith, Evansville and Crawford- ville R. R. Co. v..... | 92 | Stevenson v. The State..... | 409 |
| Snyder, McKinley et al. v..... | 143 | Stewart, Marshall v..... | 243 |
| State v. Elder..... | 282 | Storms, Osborn v..... | 321 |
| State v. Mainey..... | 404 | Stultz et al. v. The State, ex rel. Steele, Pros. Att'y..... | 492 |
| State v. Rudowskey et al..... | 389 | Sturgeon et al. v. Board of Comm'rs of Daviess Co..... | 302 |
| State, Adams v..... | 565 | Sutton v. Parker et al..... | 536 |
| State, Dawson et al. v..... | 442 | Taylor, Pullman Palace Car Co. v..... | 158 |
| State, Derixson v..... | 385 | Tharp et al., Norris v..... | 47 |
| State, ex rel. Albert, Guardian, Cogswell et al. v..... | 1 | Tout et al., Kellogg et al. v..... | 146 |
| State, ex rel. Atkinson, Adm'r, et al., Albert, Cashier of the Bank of Paoli, et al. v..... | 413 | Tracy v. Quillen et al..... | 249 |
| State, ex rel. Clark, Trustee, Nich- ols, Adm'r, et al. v..... | 512 | Vanarsdall et al. v. The State, ex rel. Watson, Auditor..... | 176 |
| State, ex rel. Curran et al., v. Mal- lory et al..... | 43 | Vance v. The State..... | 460 |
| State, ex rel. Julian, v. Adams..... | 393 | Vincennes National Bank et al., Helphenstine v..... | 582 |
| State, ex rel. Morgan, Guardian, et al., Potts et al. v..... | 273 | Walker, Rankin et al. v..... | 222 |
| State, ex rel. Steele, Pros. Att'y, Stultz et al. v..... | 492 | Waugh et al., Collier v..... | 128 |
| State, ex rel. Wagoner, Kresset al., Ex'rs, v..... | 106 | Watson, Catherwood v..... | 576 |
| State, ex rel. Watson, Auditor, Vanarsdall et al. v..... | 176 | Welshbillig et al. v. Dienhart..... | 94 |
| State, ex rel. Wildermuth, Fisher v. 51 | | Whisnand, Adm'r, et al. v. Small et al..... | 120 |
| State, ex rel. Zartman, Cunning- ham v..... | 377 | Williams v. Nesbit..... | 171 |
| | | Williams et al. v. Hall et al..... | 129 |
| | | Willson, Binford, Adm'r, v..... | 70 |
| | | Wright, Ex Parte..... | 504 |
| | | Young v. Schlosser..... | 225 |

TABLE OF THE CASES

CITED IN THIS VOLUME.

| | | | |
|---------------------------------------|----------|---------------------------------------|----------|
| Abel v. Alexander, 45 Ind. 523... | 490 | Baugh v. Boles, 35 Ind. 524..... | 82 |
| Abdil v. Abdil, 33 Ind. 460 | 108 | Beaver v. President, etc., 34 Ind. | |
| Adams v. Cosby, 48 Ind. 158 | 533 | 245 | 50 |
| Adams v. Haskell, 6 Cal. 316..... | 511 | Bell v. Reed, 4 Binney, 127..... | 194 |
| Adams v. State, 48 Ind. 212..... | 393 | Bellefontaine R. W. Co. v. Hun- | |
| Adams Express Co. v. Hill, 48 | | ter, 33 Ind. 335..... | 343, 533 |
| Ind. 157. | 206 | Bentley v. Dunkle, 57 Ind. 374... | 82 |
| Adkins v. Adkins, 48 Ind. 12..... | 98 | Bersch v. State, 13 Ind. 434..... | 520 |
| Adkins v. Nicholson, 39 Ind. 535... | 127 | Bescher v. State, 63 Ind. 302..... | 5 |
| Adney v. Vernon, 3 Lev. 243. . | 247 | Bethell v. Bethell, 54 Ind. 428 .. | 485 |
| Albany City Bank v. Schermer- | | Bickley v. Commonwealth, 2 J. J. | |
| horn, 9 Paige, 372..... | 512 | Mar. 572..... | 511 |
| Alexander v. Dunn, 5 Ind. 122..... | 520 | Bird v. Lanius, 7 Ind. 615..... | 594 |
| Alexander v. Jameson, 5 Binney, | | Bishplinghoff v. Bauer, 52 Ind. | |
| 238 | 520 | 519 | 18 |
| Alexander v. North-Western, etc., | | Bishop v. State, 50 Ind. 125..... | 444 |
| University, 57 Ind. 466..... | 533 | Black v. Duncan, 60 Ind. 522..... | 487 |
| Alexander v. State, 48 Ind. 394... | 214 | Black v. State, 57 Ind. 109..... | 463 |
| Alford v. Baker, 53 Ind. 279 | 82 | Blackstock v. New York, etc., R. | |
| Allen v. Anderson, 44 Ind. 395 99, | 467 | R. Co., 1 Bosworth, 77..... | 194 |
| Allen v. Crow, 48 Ind. 801 | 398 | Blackstock v. New York, etc., R. | |
| Allen v. Davison, 16 Ind. 416..... | 595 | R Co., 20 N. Y. 48..... | 196 |
| Allen v. State, 61 Ind. 268..... | 516 | Blair v. Allen, 55 Ind. 409..... | 485 |
| Amidon v. Gaff, 24 Ind. 128. 343, | 533 | Blair, In re, 4 Wis. 521..... | 511 |
| Amory v. Reilly, 9 Ind. 490..... | 152 | Board, etc., v. Day, 19 Ind. 450... | 181 |
| Andrews v. Andrews, 12 Ind. 348, | 467 | Board, etc., v. Kromer, 8 Ind. 446, | 343 |
| Anonymous, 2 Salk. 586 | 512 | Board, etc., v. Louisville, etc., R. | |
| Archer v. Heiman, 21 Ind. 29..... | 246 | W. Co., 39 Ind. 192..... | 453 |
| Ault v. Zehering, 38 Ind. 429..... | 267 | Board, etc., v. McIlvain, 24 Ind. | |
| | | 382 | 179 |
| Baker v. Arctic Ditchers, 54 Ind. | | Board, etc., v. Miles, 21 Ind. 438, | 135 |
| 310 | 311 | Board, etc., v. Silvers, 22 Ind. 491, | 426 |
| Baker v. Armstrong, 57 Ind. 189, | 152 | Board, etc., v. State, 61 Ind. 379, | 347 |
| Baker v. Board, etc., 53 Ind. 497, | 184, 307 | Booker v. Bowles, 2 Blackf. 90... | 366 |
| Baldwin v. Kerlin, 46 Ind. 426. 60, | 467 | Boots v. Canine, 58 Ind. 450 | 202 |
| Ball v. Balfie, 41 Ind. 221 | 425 | Bourgette v. Hubinger, 30 Ind. | |
| Ball v. Carley, 3 Ind. 577..... | 520 | 296 | 224, 370 |
| Baltimore, etc., R. R. Co. v. City of | | Boyd v. Blaisdell, 15 Ind. 73..... | 315 |
| Wheeling, 13 Grat. 40 | 511 | Brass Crosby, In re, 3 Wils. 188. | 511 |
| Bardeus v. Huber, 45 Ind. 235... | 127 | Breedlove v. Martinsville, etc., R. | |
| Barders v. Huber, 60 Ind. 132... | 128 | R. Co., 12 Ind. 114..... | 470 |
| Barkwell v. State, 4 Ind. 179 | 397 | Brent v. Oyler, 49 Ind. 453..... | 152 |
| Barnes v. Bartlett, 47 Ind. 38. 60, | 467 | Briggs v. Town of Georgia, 10 Vt. | |
| Bates v. Spooner, 45 Ind. 489 | 108 | 68 | 375 |
| Battershall v. Davis, 31 Barb. 323, | 460 | Brigham v. Foster, 7 Allen, 419... | 375 |
| | | Brinkman v. State, 57 Ind. 76... | 285 |

TABLE OF CASES CITED.

vii

| | |
|---|--|
| Briscoe v. Stephens, 9 Moore, 413.247 | Cohen, Ex Parte, 6 Cal. 318.....511 |
| Britz v. Johnson, 65 Ind. 561.....152 | Colburn v. State, 47 Ind. 310..... 4 |
| Broker v. Scobey, 56 Ind. 588.....310 | Colerick v. McCleas, 9 Ind. 245....491 |
| Brooks v. Allen, 62 Ind. 401.....490 | Collier v. Waugh, 64 Ind. 456....128 |
| Brooks v. Riding, 46 Ind. 15.....595 | Collins v. Frost, 54 Ind. 242.....520 |
| Brown v. Budd, 2 Ind. 442.....579 | Comer v. Himes, 49 Ind. 482.....343 |
| Bruce v. State, 9 Ind. 206.....285 | Commonwealth v. Cunningham. |
| Bruner v. State, 58 Ind. 159.....573 | 13 Mass. 245.....286 |
| Buck v. Smiley, 64 Ind. 431.....254 | Commonwealth v. Kinney, 2 Va. |
| Buckner v. State, 56 Ind. 208.....315 | Car. 139..... 286 |
| Burkam v. Fitch, 51 Ind. 375.....220 | Commonwealth v. Newton, 1 Grant, |
| Burke v. State, 47 Ind. 528.....511 | Pa. 453.....511 |
| Burton v. Reeds, 20 Ind. 87.....487 | Commonwealth v. Squire, 1 Met. |
| Busenbarke v. Ramey, 53 Ind. 499.105 | 258.....286 |
| Butler v. Jaffray, 12 Ind. 504.....115 | Commonwealth v. Tenney, 97 |
| | Mass. 50..... 286 |
| | Commonwealth v. Wilde, 5 Gray, |
| | 83.....321 |
| Camp v. Brown, 48 Ind. 575..... 17 | Condict v. Grand Trunk R. W. Co., |
| Campbell v. Cross, 39 Ind. 155.... 247 | 54 N. Y. 500. 196 |
| Campbell v. Dutch, 36 Ind. 504.343,583 | Conger v. Hudson Riv. R. R. Co., |
| Campbell, In re, 7 Am. L. Reg., | 6 Duer, 375 196 |
| n. s. 100.....295 | Cook v. Tullis, 18 Wal. 332 73 |
| Caress v. Foster, 62 Ind. 145.....421 | Coombs v. Carr, 55 Ind. 303 152 |
| Carr v. Howard, 8 Blackf. 190.....491 | Copeland v. New England M. Ins. |
| Carr v. McCampbell, 61 Ind. 97...498 | Co., 2 Met. 432.557 |
| Cassel v. Scott, 17 Ind. 514108 | Covert v. Shirk, 58 Ind. 264.....400 |
| Catlett v. Gilbert, 23 Ind. 614.....127 | Covey v. Neff, 63 Ind. 391..... 5 |
| Chance v. Indianapolis, etc., G. R. | Cowger v. Gordon, 4 Blackf. 110.595 |
| Co., 32 Ind. 472. 520 | Cox v. Reynolds, 7 Ind. 257.. 595 |
| Charles v. Malott, 51 Ind. 350.....185 | Cox v. State, 49 Ind. 568 78 |
| Check v. State, 35 Ind. 492 520 | Craft v. State Bank, 7 Ind. 219...589 |
| Cheney v. Boston, etc., R. R. Co., | Craig v. Donovan, 63 Ind. 513....485 |
| 11 Met. 121168 | Cravens v. Kiser, 4 Ind. 512.....595 |
| Chrisman v. Tuttle, 59 Ind. 155...490 | Cravens v. Kitts, 64 Ind. 581..521,581 |
| Cincinnati, etc., R. R. Co. v. Wells, | Crook v. People, 16 Ill. 534..... 511 |
| 39 Ind. 539.....181 | Crosby v. Jeroloman, 37 Ind. 264.267 |
| Cincinnati M. Ins. Co. v. May, 20 | Cunningham v. McKindley, 22 |
| Ohio, 211.557 | Ind. 149.....421 |
| City F. Ins. Co. v. Corlies, 21 | Cutler v. State, 42 Ind. 244 511 |
| Wend. 367.....557 | |
| City of Burlington v. Gilbert, 31 | Daly v. Nat'l L. Ins. Co., 64 Ind. |
| Iowa, 356.....460 | 1207 |
| City of Crawfordsville v. Barr, 45 | Davidson v. Nebaker, 21 Ind. 334.247 |
| Ind. 258.....367 | Dawson v. Coffman, 28 Ind. 220...311 |
| City of Crawfordsville v. Brun- | Davis v. Langsdale, 41 Ind. 399..127, |
| dage, 57 Ind. 262.....280 | 152 |
| City of Crawfordsville v. Irwin, | DeArmond v. Adams, 25 Ind. 455.108, |
| 46 Ind. 438.....370 | 127 |
| City of Crawfordsville v. Johnson, | Dearsdorff v. Foresman, 24 Ind. |
| 51 Ind. 397.....371 | 481.401 |
| City of Indianapolis v. Imberry, | Delawter v. Sand Creek, etc., Co., |
| 17 Ind. 175.....426 | 26 Ind. 407..... 64,343 |
| City of Lafayette v. Fowler, 34 | Deming v. State, 23 Ind. 416.....266 |
| Ind. 140.....426 | Denny v. Mattoon, 2 Allen, 361...440 |
| City of Madison v. Korbly, 32 Ind. | Dequindre v. Williams, 31 Ind. |
| 74.....397 | 444108 |
| City of Peru v. Bearss, 55 Ind. | Detroit, etc., R. R. Co. v. Bearss, |
| 576.....503 | 39 Ind. 598.....181,436 |
| Clem v. State, 42 Ind. 420.....285 | Dibble v. State, 48 Ind. 470..... 56 |
| Coffin v. McClure, 23 Ind. 356.....115 | |

| | | | |
|---|----------|---|----------|
| Dietrich v. Pennsylvania R. R. Co., 71 Pa. State, 432..... | 168 | Franklin L. Ins. Co. v. Sefton, 58 Ind. 380..... | 556 |
| Dixon v. Hunter, 57 Ind. 278..... | 152 | Freeze v. DePuy, 57 Ind. 188, 16, 56, 812 | |
| Dixon v. Sadler, 5 M. & W. 405..... | 557 | Frink v. Coe, 4 Greene, Iowa, 555, 584 | |
| Dobyns v. Weadon, 50 Ind. 298..... | 398 | Frink v. Potter, 17 Ill. 406..... | 584 |
| Dodge v. Gaylord, 53 Ind. 365..... | 478 | Fritz v. State, 40 Ind. 18..... | 285 |
| Doe v. Collins, 1 Ind. 24..... | 127 | Froman v. Froman, 13 Ind. 317..... | 467 |
| Doe v. Harter, 1 Ind. 427..... | 152 | Fromm v. Leonard, 21 Ind. 243..... | 538 |
| Doe v. Hayes, 4 Ind. 117..... | 151 | | |
| Doe v. Heath, 7 Blackf. 154..... | 150 | Galena, etc., R. R. Co. v. Yarwood, 15 Ill. 468..... | 584 |
| Doherty v. Chase, 64 Ind. 78..... | 5 | Galvin v. Crouch, 65 Ind. 56..... | 211 |
| Donohue v. Dyer, 23 Ind. 521..... | 348 | Galvin v. State, 64 Ind. 96..... | 845 |
| Driskill v. Board, etc., 58 Ind. 532, 184, 307..... | 307 | Garner v. Graves, 54 Ind. 188..... | 237 |
| Druliner v. State, 29 Ind. 308..... | 397 | Gass v. State, 34 Ind. 425..... | 397 |
| Dudgeon v. Pembroke, 10 Eng. R. 192..... | 557 | Gavin v. Graydon, 41 Ind. 559, 108, 127 | |
| Durham v. Bischof, 47 Ind. 211..... | 281 | Gavin v. Shuman, 23 Ind. 32..... | 127 |
| Durham v. People, 4 Scam. 172..... | 286 | Gilbert v. Southern Ind., etc., Co., 62 Ind. 522..... | 220 |
| | | Gilchrist v. Gough, 63 Ind. 578..... | 105 |
| Eagan v. Downing, 55 Ind. 65..... | 82 | Gillespie v. State, 9 Ind. 380..... | 286 |
| Eden v. Lingenfelter, 39 Ind. 19..... | 520 | Gilpin v. Wilson, 53 Ind. 448..... | 98 |
| Enwright v. State, 58 Ind. 567..... | 214 | Ginn v. Collins, 43 Ind. 271..... | 188 |
| Equitable Ins. Co. v. Hearne, 20 Wal. 494..... | 557 | Goddard v. Renner, 57 Ind. 532..... | 128 |
| Ervine's Appeal, 16 Pa. State, 256, 441 | | Goodrich v. Bodurtha, 6 Gray, 323, 247 | |
| Estell v. Knightstown, etc., T. P. Co., 41 Ind. 174..... | 470 | Goodrich v. Friedersdorff, 27 Ind. 308..... | 127 |
| Etter v. Armstrong, 46 Ind. 197..... | 272 | Gordon v. Cowger, 4 Blackf. 281..... | 595 |
| Etzler v. Evans, 61 Ind. 56..... | 234 | Gossard v. Ferguson, 54 Ind. 519..... | 128 |
| Evans v. Ashby, 22 Ind. 15..... | 108, 176 | Gould v. Hayden, 63 Ind. 443, 247, 267 | |
| Evans v. Browne, 30 Ind. 514..... | 498 | Gove v. Farmers' M. F. Ins. Co., 48 N. H. 41..... | 557 |
| Evans v. Hamilton, 56 Ind. 84..... | 82 | Graeter v. Williams, 55 Ind. 461..... | 19 |
| Evans v. State, 7 Ind. 271..... | 42 | Graham v. Graham, 55 Ind. 23..... | 343 |
| Evansville, etc., R. R. Co. v. City of Evansville, 15 Ind. 395..... | 458 | Gray v. Cook, 24 How. Pr. 432..... | 511 |
| Evansville, etc., R. R. Co. v. Snapp, 61 Ind. 308..... | 94 | Gray v. Stivers, 38 Ind. 197..... | 597 |
| Ewart v. Street, 2 Bailey, 157..... | 194 | Greenup v. Crooks, 50 Ind. 410, 3, 328 | |
| Ewing v. Patterson, 35 Ind. 326..... | 82 | Grover v. Dill, 3 Iowa, 387..... | 211 |
| | | Haag v. Board, etc., 60 Ind. 511, 306, 342 | |
| Feital v. Middlesex R. R. Co., 109 Mass. 398..... | 584 | Hackleman v. Harrison, 50 Ind. 156..... | 108 |
| Feriter v. State, 38 Ind. 283..... | 597 | Hadley v. Guttridge, 58 Ind. 302..... | 398 |
| First Nat'l Bank, etc., v. Indianap- olis, etc., Co., 45 Ind. 5..... | 247, 486 | Haines v. Haines, 35 Mich. 138..... | 511 |
| Fischli v. Fischli, 1 Blackf. 360..... | 246 | Halstead v. Board, etc., 56 Ind. 363..... | 307, 371 |
| Fisher v. Evansville, etc., R. R. Co., 7 Ind. 407..... | 458 | Halstead v. Brown, 17 Ind. 202..... | 491 |
| Fisher v. Ewing, 30 Ind. 130..... | 224 | Hamar v. Medsker, 60 Ind. 413..... | 99 |
| Fite v. Doe, 1 Blackf. 127..... | 314 | Hamilton v. Burch, 28 Ind. 233..... | 314 |
| Fletcher v. Austin, 11 Vt. 447..... | 402 | Hamilton v. State, 36 Ind. 280..... | 285 |
| Fletcher v. Holmes, 25 Ind. 458..... | 248 | Hamilton v. Winterrowd, 43 Ind. 393..... | 69 |
| Flinn v. Parsons, 60 Ind. 573..... | 26 | Hamlin v. Great Northern R. W. Co., 1 H. & N. 408..... | 171 |
| Ford v. Geauga Co., 7 Ohio, 492..... | 295 | Hamlyn v. Nesbit, 37 Ind. 284..... | 18 |
| Forkner v. Shafer, 56 Ind. 120, 115, 237 | | Hampson v. Fall, 64 Ind. 382..... | 581 |
| Foust v. Moorman, 2 Ind. 17..... | 581 | Hankins v. Kimball, 57 Ind. 42..... | 331 |
| Fouty v. Fouty, 34 Ind. 433..... | 98 | Harbaugh v. Hohn, 52 Ind. 243..... | 128 |
| Frank v. Brasket, 44 Ind. 92..... | 295 | Hardin v. Helton, 50 Ind. 319..... | 597 |
| | | Hardy v. Blazer, 29 Ind. 226..... | 294 |

TABLE OF CASES CITED.

ix

| | | | |
|---|-----|---|-------|
| Harness v. State , 57 Ind. 1..... | 54 | Howland v. Marine Ins. Co. , 2 | |
| Harney v. Indianapolis, etc., R. R. | | Cranch C. C. 474..... | 557 |
| Co. , 32 Ind. 244..... | 180 | Huber v. State , 57 Ind. 841..... | 320 |
| Harrington v. Dollman , 64 Ind. | | Huckins v. People's M. F. Ins. Co. , | |
| 255..... | 224 | 11 Post. N H. 288..... | 557 |
| Harrison v. Price , 22 Ind. 165..... | 520 | Huddleston v. Pearson , 6 Ind. 387. 397 | |
| Harrison v. Simons , 8 Edw. Ch. | | Hudson v. State , 54 Ind. 378..... | 5,517 |
| 394..... | 151 | Huff v. Cole , 45 Ind. 300..... | 490 |
| Harvey v. Smith , 17 Ind. 272..... | 51 | Hughart v. Lenburg , 45 Ind. 498..128 | |
| Haskett v. State , 51 Ind. 176..... | 511 | Hughes, In re , 11 Nat'l Bankr. | |
| Haun v. Mulberry, etc., G. R. Co. , | | Reg. 452..... | 295 |
| 33 Ind. 103..... | 470 | Hummel, In re , 9 Watts, 416..... | 512 |
| Hawley v. Griswold , 42 Barb. 18..... | 460 | Hunt v. Breeding , 12 S. & R. 37..... | 295 |
| Hay v. State , 58 Ind. 837..... | 280 | Hunt v. State , 53 Ind. 821..... | 401 |
| Hayes v. Matthews , 68 Ind. 412... 29 | | Hunter v. State , 6 Ind. 423..... | 511 |
| Hays v. Crutcher , 54 Ind. 260..... | 29 | Hynds v. Hays , 25 Ind. 31..... | 473 |
| Hays v. Thomae , 56 N. Y. 521..... | 151 | | |
| Hazard's Adm'r v. New England | | Indiana, etc., R. W. Co. v. City of | |
| M. Ins. Co. , 8 Pet. 557..... | 557 | Attica , 56 Ind. 476..... | 458 |
| Headrick v. Wisheart , 57 Ind. 129..186 | | Indianapolis, etc, Mfg. Co. v First | |
| Heaton v. Cincinnati, etc., R. R. | | Nat'l Bank, etc. , 33 Ind. 802... 42 | |
| Co. , 16 Ind. 276..... | 470 | Indianapolis, etc., R. R. Co. v. | |
| Heavenridge v. Mondy , 49 Ind. 434.60, | | Stout , 53 Ind. 148..... | 583 |
| 467..... | | Indianapolis, etc., R. W. Co. v. | |
| Hebel v. Scott , 36 Ind. 226... .. | 315 | Beaver , 41 Ind. 498..... | 534 |
| Hegeman v. Western R. R. Corp. , | | Indianapolis, etc., R. W. Co. v. | |
| 13 N. Y. 1..... | 534 | Birney , 71 Ill. 391..... | 171 |
| Heilman v. Shanklin , 60 Ind. 424. 18 | | Indianapolis Sun Co. v. Horrell , | |
| Helwig v. Jordan , 53 Ind. 21... .. | 342 | 53 Ind. 527..... | 206 |
| Hellenkamp v. City of Lafayette , | | Inglis v. State , 61 Ind. 212..... | 516 |
| 30 Ind. 192..... | 426 | Ins. Co. v. Wilkinson , 13 Wal. | |
| Hewitt v. Jenkins , 60 Ind. 110..... | 55 | 222..... | 557 |
| Hickey v. State , 23 Ind. 21..... | 285 | | |
| Higert v. Trustees, etc. , 53 Ind. 326.470 | | Jackson v. Rounds , 59 Ind. 116...276 | |
| Hill v. Newman , 47 Ind. 187..... | 365 | Jackson v. Snell , 34 Ind. 241..... | 152 |
| Hill v. Portland, etc., R. R. Co. , 55 | | Jackson v. State , 14 Ind. 327..... | 285 |
| Me. 438..... | 557 | Jager v. Doherty , 61 Ind. 528..... | 453 |
| Hinkle v. Margerum , 50 Ind. 240.6, 50 | | Jarvis v. Hyatt , 43 Ind. 163..... | 254 |
| Hite v. The State , 9 Yerg. 357..... | 286 | Jeffersonville, etc., R. R. Co. v. | |
| Hoadley v. Hadley , 48 Ind. 452...188 | | Worland , 50 Ind. 839..... | 526 |
| Hobbs v. London, etc., R. W. Co. , | | Jenkins v. Long , 23 Ind. 460..... | 315 |
| L. R. 10 Q. B. 111..... | 171 | Jenks v. Opp , 43 Ind. 108..... | 188 |
| Hoffman v. Risk , 58 Ind. 113..... | 106 | Johnson v. State , 65 Ind. 204..... | 270 |
| Hogshead v. Williams , 55 Ind. 145.254 | | Johnston v. Commonwealth , 1 | |
| Holland v. Johnson , 51 Ind. 846.491 | | Bibb , 598..... | 511 |
| Holman v. Mayor, etc. , 34 Tex. | | Jones v. Cincinnati Type Foundry | |
| 668..... | 511 | Co. , 14 Ind. 89..... | 206 |
| Holmes v. Bybee , 34 Ind. 262..... | 127 | Jones v. Coopridger , 1 Blackf. 47...366 | |
| Holt v. State , 38 Ga. 187..... | 286 | Jones v. Julian , 12 Ind. 274..... | 42 |
| Hood v. State , 66 Ind. 263..... | 409 | Jones v. State , 59 Ind. 229..... | 321 |
| Hopkins v. Greensburg, etc., T. P. | | Joseph v. Burk , 46 Ind. 59..... | 108 |
| Co. , 46 Ind. 187..... | 19 | Josselyn v. Edwards , 57 Ind. 212. 106 | |
| Hopkins v. Stanley , 43 Ind. 553...595 | | Julian v. Beal , 26 Ind. 220..... | 152 |
| Horton v. Wilson , 25 Ind. 316..... | 311 | | |
| Hosack v. Rogers , 11 Paige, 603...511 | | Kalbrier v. Leonard , 34 Ind. 497. 426 | |
| House v. Board, etc. , 60 Ind. 580...525 | | Kaufman v. Wilson , 29 Ind. 504. 492 | |
| Howard v. Bates , 8 Met. 484..... | 342 | Kearney, Ex Parte , 7 Wheat. 88...511 | |
| Howe v. State , 10 Ind. 423..... | 410 | Kellogg v Ely , 15 O. S. 64..... | 460 |
| Hawk v. Pollard , 6 Blackf. 108...595 | | Kelly v. Weddle , 1 Ind. 550..... | 511 |

TABLE OF CASES CITED.

| | | | |
|--------------------------------------|----------|--|-----|
| Kernodle v. Cason, 25 Ind. 362.... | 511 | McDill v. Gunn, 48 Ind. 315..... | 106 |
| Kesler v. Myers, 41 Ind. 548..... | 224 | McElroy v. Nashua, etc., R. R. | |
| Key v. Commonw'th, 8 Bibb. 495.. | 398 | Corp., 4 Cush. 400..... | 584 |
| King v. Anthony, 2 Blackf. 131.... | 314 | McEntire v. Brown, 28 Ind. 347... | 127 |
| King v. Emden, 9 East, 437..... | 286 | McEwen v. Gilker, 38 Ind. 233.... | 426 |
| King v. Vandercomb, 2 Leach, 708. | 286 | McGuire v. State, 50 Ind. 284..... | 444 |
| Kirby v. Studebaker, 15 Ind. 45.... | 490 | M'Intosh v. Chew, 1 Blackf. 289... | 295 |
| Kohler v. Montgomery, 17 Ind. | | McKernan v. Neff, 43 Ind. 503.... | 152 |
| 220..... | 590 | McMahan v. Spinning, 51 Ind. | |
| Krewson v. Cloud, 45 Ind. 273.... | 69 | 187..... | 98 |
| Laidla v. Loveless, 40 Ind. 211.... | 580 | McMahon v. Flanders, 64 Ind. 384. | 385 |
| Landers v. George, 49 Ind. 309.... | 108 | McManus v. Richardson, 8 Blackf. | |
| Lane v. Cotton, 1 Ld. Raym. 646.. | 194 | 100..... | 314 |
| Langdon v. State, 52 Ind. 459..... | 444 | McMullen v. Clark, 49 Ind. 77.... | 365 |
| Langdon, Ex Parte, 25 Vt. 680.... | 512 | McMullen v. Furnas, 1 Ind. 160.. | 511 |
| Largsdale v. Girtton, 51 Ind. 99... | 595 | Meier v. Penn. R. R. Co., 64 Pa. | |
| Lapping v. Duffy, 47 Ind. 51.. | 280, 246 | State, 225..... | 584 |
| Larr v. State, ex rel, 45 Ind. 364. | 107 | Michigan, etc., R. R. Co. v. Bivens, | |
| Lashley v. Cassell, 23 Ind. 600.... | 127 | 18 Ind. 263..... | 594 |
| Latta v. Griffith, 57 Ind. 329..... | 315 | Mickey v. Burlington Ins. Co., 85 | |
| Leeds v. Mechanics' Ins. Co., 8 N. | | Iowa, 174..... | 567 |
| Y. 351..... | 557 | Mico v. Morris, 3 Lev. 234..... | 247 |
| Leitch v. Wells, 48 N. Y. 585..... | 564 | Miles v. Buchanan, 36 Ind. 490.... | 224 |
| Lindley v. Kelley, 42 Ind. 294.... | 295 | Miller v. Billingsly, 41 Ind. 489... | 581 |
| Lippard v. Edwards, 39 Ind. 165.. | 247 | Miller v. Wild Cat G. R. Co., 52 | |
| Little v. Alexander, 21 Wal. 500.... | 294 | Ind. 51..... | 470 |
| Long v. Rodman, 58 Ind. 58..... | 376 | Millholland v. Bryant, 39 Ind. 368. | 398 |
| Long v. State, 56 Ind. 138..... | 315 | Milligan v. Poole, 35 Ind. 64..... | 152 |
| Lotz v. Briggs, 60 Ind. 346..... | 520 | Mills v. Malott, 43 Ind. 248..... | 185 |
| Lovejoy v. Robinson, 8 Ind. 399.... | 542 | Moberry v. City of Jeffersonville, | |
| Lowry v. State, 64 Ind. 421..... | 5, 518 | 38 Ind. 198..... | 426 |
| Lucas v. Smith, 42 Ind. 103..... | 69 | Moon v. State, 3 Ind. 438..... | 42 |
| Luce v. Dorchester Ins. Co., 105 | | Moore v. State, 55 Ind. 360.... | 280 |
| Mass. 297..... | 557 | Morgan v. Olvey, 53 Ind. 6..... | 82 |
| Lyon v. Hampton, 20 Pa. State, 46. | 295 | Morgan v. State, 61 Ind. 447..... | 89 |
| Lytle v. Lytle, 37 Ind. 281..... | 237 | Morrison v. Fishel, 64 Ind. 177.... | 486 |
| Makepeace v. Lukens, 27 Ind. 435. | 315 | Morse v. Morse, 25 Ind. 156..... | 343 |
| Manning v. Gasharie, 27 Ind. | | Morse v. Slue, Vent. 190..... | 194 |
| 399..... | 843, 595 | Moss v. Rossie L. M. Co., 5 Hill, 137. | 183 |
| Mansur v. Haughey, 60 Ind. 364. | 342 | Moss v. Witness Printing Co., 64 | |
| Mark v. State, 15 Ind. 98..... | 549 | Ind. 125..... | 473 |
| Murkel v. Evans, 47 Ind. 326..... | 72 | Munger v. Green, 20 Ind. 38..... | 371 |
| Marshall v. Knox, 12 Am. L. Reg. | | Murphy v. Staton, 3 Munf. 239... | 194 |
| N. s. 630..... | 295 | Mutual Ben. L. Ins. Co. v. Can- | |
| Marshall v. Knox, 16 Wal. 551.... | 302 | non, 43 Ind. 264..... | 11 |
| Martin v. Bevan, 58 Ind. 282..... | 202 | Myers v. Jarboe, 56 Ind. 57..... | 6 |
| Martin v. Wyncoop, 12 Ind. 266.... | 92 | Myers v. Murphy, 60 Ind. 282. 55, | 312 |
| Matlock v. Todd, 19 Ind. 130..... | 520 | Nebeker v. Cutsinger, 48 Ind. 436. | 538 |
| May v. Fletcher, 40 Ind. 575..... | 152 | Needham v. Gillespy, 49 Ind. 245. | 247 |
| McArthur v. Sears, 21 Wend. 190. | 194 | Nelson v. Davis, 40 Ind. 366..... | 467 |
| McConnell v. State, 46 Ind. 298.... | 511 | New v. Reissner, 56 Ind. 118. 115, | 237 |
| McCormack v. First Nat'l Bank, | | New Albany, etc., R. R. Co. v. Mc- | |
| etc., 53 Ind. 466..... | 175 | Cormick, 10 Ind. 499..... | 470 |
| McCormick v. Mitchell, 57 Ind. | | New England, etc., Ins. Co. v. | |
| 248..... | 18 | Robinson, 25 Ind. 536..... | 207 |
| M'Creadie v. Senior, 4 Paige, 378.. | 512 | New Jersey R. R. Co. v. Kennard, | |
| McDaniel v. Correll, 19 Ill. 226... | 440 | 21 Pa. State, 203..... | 534 |

TABLE OF CASES CITED.

xi

| | |
|--|--|
| Newcomb v. Horton, 18 Wis. 566..452 | Reynolds v. Jones, 19 Ind. 123... 72 |
| Nicholson v. Caress, 59 Ind. 89... 99, 421, 467 | Reynolds v. State, 61 Ind. 392...397 |
| Noble v. Enos, 19 Ind. 72.....595 | Richards v. Rote, 68 Pa. State, 248..441 |
| O'Halloran v. Leachey, 39 Ind. 150.224, 370 | Ricketts v. Dorrell, 59 Ind. 427...162 |
| O'Harra v. Stone, 48 Ind. 417... 295 | Ridgeway v. Dearinger, 42 Ind. 157.533 |
| O'Herrin v. State, 14 Ind. 420..... 42 | Rinehart v. Bowen, 44 Ind. 353.....328 |
| Ohio, etc., R. W. Co. v. Dickerson, 59 Ind. 317..... 534 | Roberts v. Masters, 40 Ind. 461.72, 174 |
| Oil Creek, etc., R. W. Co. v. Clark, 72 Pa. St. 231 168 | Roberts v. State, 14 Ga. 8.....286 |
| Oliver v. Piatt, 3 How. 833.....421 | Robinson v. Johnson, 61 Ind. 535.317, 328 |
| Overturf v. Martin, 2 Ind. 507.....491 | Rock v. Stinger, 36 Ind. 846.....184 |
| Palmer v. Stumph, 29 Ind. 329...426 | Rodman v. Rodman, 54 Ind. 444..381 |
| Parks v. Sheldon, 86 Conn. 466...295 | Rogers v. Gibson, 15 Ind. 218.....179 |
| Parsons v. Hardy, 14 Wend. 215...196 | Romine v. Romine, 59 Ind. 346... 82 |
| Patterson v. State, 12 Ind. 86.....393 | Rollins v. State, 62 Ind. 46.....571 |
| Pauley v. Weisart, 59 Ind. 241...233 | Root v. Dill, 38 Ind. 169.....246 |
| Pawling v. United States, 4 Cranch, 219 401 | Rosenbaum v. Schmidt, 54 Ind. 231 18 |
| Pence v. Makepeace, 65 Ind. 345..238 | Ross v. Boswell, 60 Ind. 235.....237 |
| People v. Craft, 7 Paige, 325 512 | Ross v. Lafayette, etc., R. R. Co., 6 Ind. 297 470 |
| People v. Goodwin, 5 N. Y. 568...460 | Rosser v. Barnes, 16 Ind. 502.....595 |
| People v. Hackley, 24 N. Y. 74...512 | Rowe, Ex parte, 7 Cal. 175.....512 |
| People v. Ridgley, 21 Ill. 64.....502 | Rudolph v. Lane, 57 Ind. 115..... 78 |
| People v. Van Keurin, 6 Parker C. C. 66.....286 | Sage v. Brown, 34, Ind. 464.....595 |
| People v. Whitcomb, 55 Ill. 172...502 | Sanford v. Freeman, 5 Ind. 129...145 |
| Pettis v. Johnson, 56 Ind. 139...842 | Sankey v. Terre Haute, etc., R. R. Co., 42 Ind. 402.....458 |
| Petty v. Myers, 49 Ind. 1, 8. 132, 453 | Schappner v. Second Av. R. R. Co., 55 Barb. 497..... 520 |
| Philadelphia, etc., R. R. Co. v. Derby, 14 How. 468.....534 | Schnepf, In re, 7 Am. L. Reg. n. s. 204 295 |
| Phillips v. Reichert, 17 Ind. 120...487 | School Town of Princeton, v. Geb- hart, 61 Ind. 187..... 310, 419 |
| Pierce v. Goldsberry, 31 Ind. 52...491 | Schoonover v. Reed, 65 Ind. 313..328 |
| Pitt v. Davison, 37 N. Y. 235...511 | Scotten v. Divilbias, 60 Ind. 37.310, 419 |
| Pittsburgh, etc., R. W. Co. v. Mor- ton, 61 Ind. 589.....192 | Seaman v. Duryea, 10 Barb. 523...511 |
| Porter v. Holloway, 43 Ind. 35...590 | Shaeffer v. Sleade, 7 Blackf. 178... 51 |
| Porter v. Mount, 45 Barb. 422...520 | Shanefelter v. Kenworthy, 42 Ind. 501 4 |
| Potter v. Stiles, 32 Ind. 318.....224 | Shanks v. Albert, 47 Ind. 461...533 |
| President, etc., v. Hamilton, 34 Ind. 506 98 | Sharman v. Howell, 2 Am. Rep. 576 295 |
| Pressler v. Turner, 57 Ind. 56...108 | Sharman v. Howell, 40 Ga. 251...295 |
| Price v. Sanders, 60 Ind. 310..... 82 | Sharp v. United States, 4 Watts, 21..... 403 |
| Price v. State, 19 Ohio, 423...286 | Shearer v. State, 7 Blackf. 99..... 410 |
| Proprietors, etc., v. Wood, 3 Esp. 127 194 | Sheets v. Andrews, 2 Blackf. 274 ..487 |
| Randall v. Ghent, 19 Ind. 271...467 | Sherman v. Hogland, 54 Ind. 578.. 82 |
| Reagan v. Hadley, 57 Ind. 509... 98 | Shirts v. Irons, 47 Ind. 445 186 |
| Reed v. Carter, 3 Blackf. 376.....127 | Shook v. State, 53 Ind. 403 516 |
| Reed v. Reed, 44 Ind. 429.....261 | Shroyer v. Bash, 57 Ind. 849 202 |
| Reese v. McQuilkin, 7 Ind. 450...487 | Singer Mfg. Co. v. Brown, 64 Ind. 548 207 |
| Regina v. Cruse, 8 Car. & P. 881..575 | Skelton v. Ward, 51 Ind. 46..... 72 |
| Regina v. Paty, Ld. Raym. 1105...512 | Skillen v. Jones, 44 Ind. 136. 843, 533 |
| Regina v. Skeet, 4 F. & F. 981...574 | Skillen v. Skillen, 41 Ind. 122... 19 |
| Rex v. Belt, 2 Salk. 586.....512 | Smith v. Allison, 23 Ind. 366.....458 |
| | Smith, Ex Parte, 28 Ind. 47.....511 |

| | |
|---|--|
| Smith v. McMillen, 19 Ind. 391...520 | Stumph v. Pfeiffer, 58 Ind. 472...511 |
| Snyder v. Robinson, 35 Ind. 311...533 | Sturgeon v. Board, etc., 65 Ind. 302.....181 |
| Southerland v. Venard, 34 Ind. 390.....597 | Swift v. Tousey, 5 Ind. 196.....587 |
| Spahr v. Hollingshead, 8 Blackf. 415.....127 | Taylor v. Grand Trunk R. W. Co., 48 N. H. 304.....534 |
| Spath v. Hankins, 55 Ind. 155. 128, 311 | Terre Haute, etc., R. R. Co. v. Fitzgerald, 47 Ind. 79.....168 |
| Spears v. Ward, 48 Ind. 541.....556 | Thomas v. Passage, 54 Ind. 106...310 |
| Spence v. Spence, 4 Watts, 165...520 | Thompson v. Davis, 29 Ind. 264. 50, 72, 91 |
| Spitler v. James, 82 Ind. 202 .. 401 | Thompson v. Young, 51 Ind. 599. 58, 211 |
| Stanley v. Manly, 85 Ind. 275.....398 | Toledo, etc., R. W. Co. v. Daniels, 21 Ind. 256.....597 |
| State v. Benham, 7 Conn. 414.....286 | Toledo, etc., R. W. Co. v. Goddard, 25 Ind. 185.....76 |
| State v. Birmingham, Busbee, 120. 286 | Toledo, etc., R. W. Co., v. Weaver, 34 Ind. 298.....93 |
| State v. Chaffin, 2 Swan, 493.....286 | Traber v. Bright, 32 Ind. 69.....206 |
| State v. City of Lyons, 31 Iowa, 432.....503 | Tracy v. Quillen, 65 Ind. 249.....490 |
| State v. Cooper, 1 Green, N. J. 361.....286 | Trittip v. State, 13 Ind. 360.....285 |
| State v. Dufour, 63 Ind. 567.....305 | Trueblood v. Hollingsworth, 48 Ind. 537.....150 |
| State v. Duzan, 6 Blackf. 81.....413 | Trustees, etc., v. Flint, 18 Met. 539. 221 |
| State v. Earl, 41 Ind. 464.....511 | Tull v. David, 27 Ind. 377.....18 |
| State v. George, 53 Ind. 434.....285 | Turbeville v. State, 42 Ind. 490.....498 |
| State v. Holloway, 8 Blackf. 45...580 | Tyler v. Wilkerson, 27 Ind. 450...127 |
| State v. Hudson, 5 Vroom, 25.....460 | Uland v. Carter, 34 Ind. 344.....815 |
| State v. Keogh, 13 La. An. 243 .. 286 | Ulmer v. State, 14 Ind. 52.....271 |
| State v. Lewis, 2 Hawks, 98.....286 | United States v. Dashiell, 3 Wal. 688.....297 |
| State v. Marlow, 15 O. S. 114.....502 | Vanarsdall v. State, 65 Ind. 176...580 |
| State v. Overton, 4 Zab. 435.....168 | Vertner v. Martin, 10 Sm. & M. 108.....512 |
| State v. Pepper, 31 Ind. 76.....401 | Vincennes Nat'l Bank v. Cockrum, 64 Ind. 229 .. 146 |
| State v. Reed, 12 Md. 263.....286 | Voris v. State, 47 Ind. 345.....5 |
| State v. Sanders, 62 Ind. 562.....5 | Voss v. Johnson, 41 Ind. 19.....127 |
| State v. Shepherd, 7 Conn. 54.....286 | Walls v. Anderson, etc., R. R. Co., 60 Ind. 56.....16, 56, 312 |
| State v. Shields, 56 Ind. 521.....502 | Walls v. State, 7 Blackf. 572.....413 |
| State v. Stanly, 4 Jones N. C. 290...286 | Walpole v. Bridges, 5 Blackf. 222. 194 |
| State v. Tipton, 1 Blackf. 166.....511 | Walter A. Wood, etc., M. Co. v. Caldwell, 54 Ind. 270.....207 |
| State v. Town Council, etc., 30 Ala. 66.....503 | Waltz v. Borroway, 25 Ind. 380. 108 |
| State v. Townsend, 2 Harring. Del. 543.....286 | Waltz v. Robertson, 7 Blackf. 499. 519 |
| State v. Ward, 57 Ind. 537.....214 | Ward v. Montgomery, 57 Ind. 276. 128 |
| State Board, etc., v. Citizens St. R. W. Co., 47 Ind. 407.....307 | Watson v. Nelson, 69 N. Y. 536...512 |
| Stayton v. Hulings, 7 Ind. 144 ..542 | Webb v. Baird, 27 Ind. 368.....401 |
| Steam Nav. Co. v. Weed, 17 Barb. 378.....307 | Wells v. Shoemaker, 39 Ind. 115...135 |
| Stein v. Indianapolis, etc., Ass'n, 18 Ind. 237.....206 | Welsh v. People, 17 Ill. 339....321 |
| Steinmetz v. Versailles, etc., T. P. Co., 57 Ind. 457.....472 | Wescott v. Brown, 18 Ind. 83.....108 |
| Steinmetz v. Wingate, 42 Ind. 574...473 | Western P. R. Co. v. Stockton, 7 Ind. 500.....472 |
| Stewart v. Nunemaker, 2 Ind. 47 ..295 | Whitehead v. Cummins, 2 Ind. 58. 162 |
| Stinson v. People, 43 Ill. 397.321 | |
| St. Louis, etc., R. W. Co. v. Val-irius, 56 Ind. 511.....534 | |
| Stocking v. State, 7 Ind. 326.....271 | |
| Stockton v. Stockton, 40 Ind. 225. 533 | |
| Strong v. Downing, 34 Ind. 300...50 | |
| Strough v. Gear, 48 Ind. 100.....311 | |
| Stuart v. People, 3 Scam. 395.....512 | |

TABLE OF CASES CITED.

xiii

| | | | |
|--|-----|---|-----|
| Whithead v. Keyes, 1 Am. L. Reg. N. S. 471..... | 519 | Wilson v. State, 57 Ind. 71..... | 511 |
| Whitney v. Allaire, 1 N. Y. 805..... | 595 | Wilson v. Vance, 55 Ind. 394. 6,314 | |
| Whitney v. State, 35 Ind. 508..... | 462 | Windman v. City of Vincennes, 58 Ind. 480..... | 504 |
| Whittem v. State, 36 Ind. 196..... | 508 | Wininger v. State, 13 Ind. 540..... | 285 |
| Whitworth v. Ballard, 56 Ind. 279.119 | | Wisler v. Holderman, 40 Ind. 106.538 | |
| Wiggin v. Mayor, etc., 9 Paige,16.460 | | Wixom v. Stephens, 17 Mich. 518.247 | |
| Wild Cat Branch v. Ball, 45 Ind. 213..... | 401 | Wood v. Harrison, 50 Ind. 480..... | 220 |
| Wiler v. Manley, 51 Ind. 169..... | 19 | Wood v. Mears, 12 Ind. 515.. | 524 |
| Wiley v. Barclay, 58 Ind. 577..... | 311 | Wright v. Hughes, 13 Ind. 109.... | 843 |
| Wiley v. State, 52 Ind. 516 | 413 | Yates, In re, 4 Johns. 317..... | 511 |
| Wilkins v. DePauw, 10 Ind. 159.152 | | Yates v. People, 6 Johns. 337..... | 512 |
| Wilkinson v. State, 59 Ind. 416...286 | | Yonkey v. State, 27 Ind. 236..... | 397 |
| Williams v. State, 49 Ind. 367..... | 321 | Yount v. State, 64 Ind. 443..... | 89 |
| Willson v. Binford, 54 Ind. 569... 71 | | Zook v. State, 47 Ind. 463..... | 214 |
| Wilson v. Fatout, 42 Ind. 52..... | 152 | Zorger v. City of Greensburgh, 60 Ind. 1..... | 542 |
| Wilson v. Lemon, 23 Ind. 433..... | 127 | | |
| Wilson v. State, 24 Conn. 57..... | 286 | | |

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK.*†
HON. JAMES L. WORDEN.††
HON. WILLIAM E. NIBLACK.†
HON. HORACE P. BIDDLE.¶
HON. SAMUEL E. PERKINS.†

*Chief Justice at November Term, 1878.

†Term of office commenced January 1st, 1877.

‡Chief Justice at May Term, 1879.

¶Term of office commenced January 4th, 1875.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
GABRIEL SCHMUCK.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1878, IN THE
SIXTY-THIRD YEAR OF THE STATE.

COGSWELL ET AL. v. THE STATE, EX REL. ALBERT, GUARDIAN.

GUARDIAN AND WARD.—*Complaint on Defective Bond.*—Merely formal defects in a guardian's bond may be cured by proper averments in a complaint thereon.

SAME.—*Relator.*—An action may properly be maintained on a guardian's bond, on the relation of his successor.

SAME.—*Bond on Sale of Ward's Realty.—Breaches.*—The failure of a guardian to loan moneys realized by him from the sale of his ward's real estate, the conversion of such money by him, and his failure to pay over and account for the same, are breaches of the bond executed by him to procure the sale.

SAME.—*Guardian's Reports Attacked Collaterally.* The correctness of reports made by a guardian, to the court, of the condition of his trust, may be attacked collaterally, in an action on his bond.

SAME.—*Judgment Against Surety.—Failure to Default Guardian.*—Where, in an action against a guardian and his sureties, on his bond, the sureties fail to object, at the time, to the rendition of judgment against them alone, on the ground that there has been neither an appearance nor answer by the guardian, nor any default taken against him, they can not afterward object on those grounds.

Cogswell et al. v. The State, ex rel. Albert, Guardian.

PRACTICE.—*Motion to Strike Out.*—*Bill of Exceptions.*—A ruling upon a motion to strike out parts of a pleading must be made part of the record by a bill of exceptions.

SAME.—*Trial without Issue.*—*Waiver.*—A trial by agreement of parties, without issue, is a waiver of an issue.

SAME.—*New Trial.*—*Motion for, When Made.*—*Record.*—*Supreme Court.*—A motion for a new trial must be in writing, and must be filed at the term at which the finding or verdict is rendered.

EVIDENCE.—*Nunc Pro Tunc Entry.*—A *nunc pro tunc* entry of record, made upon proper notice and evidence, is competent evidence of the facts it recites.

From the Orange Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellants.

W. W. Spencer, S. K. Wolfe and A. Stephens, for appellee.

PERKINS, J.—Suit upon a guardian's bond, dated and approved on the 4th day of June, 1868, signed by Luke B. Cogswell, principal, and Thomas Hunt and Henry H. Polson, sureties, and conditioned, "that, as the above bound Luke B. Cogswell, guardian of the minor heirs of Stephen Foster, deceased, has been ordered by the court of common pleas of Orange county to sell all the real estate of the said _____; now, if the said Luke B. Cogswell will faithfully discharge the duties of his trust according to law, then the above obligation to be void, else to remain in full force in law."

Said bond was operative as security for the acts of said Cogswell, as guardian, till the 29th day of January, 1872, at which date he, under the provisions of law therefor, filed a new bond.

It is alleged in the complaint, "that said bond is informal, in omitting from the condition upon which the same shall become void the words, 'and the faithful payment and accounting for all moneys arising from such sale, according to law.'" It is also averred, that said bond was "duly approved."

The breaches of the bond, averred in the complaint to have been committed, are:

Cogswell et al. v. The State, ex rel. Albert, Guardian.

"1st. That, between the date when said bond was executed, and said 29th day of January, 1872, said guardian failed to loan said money, as he had the opportunity of doing, to solvent persons with solvent surety, so as to cause the same to accumulate interest, at the rate of ten per cent. per annum, thereby losing, and damaging said wards' estate in the sum of, five thousand dollars.

"2d. That, between the date when said bond was executed and the 29th day of January, 1872, when said new bond was filed as aforesaid, said Cogswell converted the whole of said moneys and interest derived from the sale of said wards' real estate, to his own private and individual use.

"3d. That said Cogswell has not faithfully discharged his duties as such guardian, with reference to said fund or moneys received by him from the sale of said real estate, by the faithful payment and accounting for the same, according to law."

A demurrer for want of facts, and for want of legal capacity in the relator to sue, was overruled, and exception entered. The relator was a guardian subsequently appointed to succeed the guardian sued.

A motion was made to strike out parts of the complaint. It was overruled, and exception entered. But no bill of exceptions was filed.

At the succeeding term, the cause, by agreement, was tried by the court, and a finding made for the plaintiff, in the sum of two thousand and sixty-six dollars and thirty-eight cents, to which was added two hundred and six dollars and sixty-two cents, and the cause was continued. At the next term, a motion for a new trial was filed and overruled, and judgment entered on the finding.

Two of the defendants only, Hunt and Polson, appeal, and they assign as errors:

1. The overruling of the demurrer to the amended complaint;

Cogswell *et al.* v. The State, *ex rel.* Albert, Guardian.

2. The overruling of the motion for a new trial ;
3. The trying of said cause without an answer ;
4. The rendering of judgment in said cause as it was rendered ;
5. The judgment rendered was erroneous ;
6. The complaint did not state a cause of action ;
7. " The judgment of the said Orange Circuit Court was and is erroneous, in this, to wit, that there was no appearance for, or answer filed by, Cogswell, and no default was taken against him on which judgment could be rendered ; and the said Hunt and Polson, being the sureties only of Cogswell, no judgment could be properly rendered against them."

The demurrer to the complaint was correctly overruled. The complaint contained a cause of action, *Colburn v. The State, ex rel.*, 47 Ind. 310; and was brought by the proper relator. 2 R. S. 1876, p. 592, sec. 13, and notes. It was not attacked by motion to make more certain ; and overruling motions to strike out are harmless errors. *Shanefelter v. Kenworthy*, 42 Ind. 501.

As to overruling the motion for a new trial.

The grounds of the motion were :

1. Refusal of the court to strike out certain items of evidence ;
2. Permitting the plaintiff to attack collaterally the reports of Cogswell as guardian ;
3. Admitting certain items of evidence ;
4. Errors in arriving at the amount charged against the defendant ;
5. The finding of the court was contrary to law and the evidence ;
6. The finding of the court was joint, and should have been several, showing the amount due to each heir.

Counsel for appellant, in their brief, insist upon the second ground for a new trial ; but the incorrectness of that

Cogswell *et al.* v. The State, *ex rel.* Albert, Guardian.

ground is established by the case of *Lowry v. The State, ex rel.*, 64 Ind. 421.

He also claims, that the court erred in admitting in evidence a certain *nunc pro tunc* record entry. That entry was made on due notice, upon hearing evidence, by the court, and we see no reason why it was not properly admitted in evidence. No objection to its admission appears to have been pointed out to the court. Many other objections are made, but they are met by the later decisions of this court, relative to the rights, duties and liabilities of guardians. Among them, *Bescher v. The State ex rel.*, 63 Ind. 302, in connection with the cases above cited, and those cited in 2 R. S. 1876, p. 585, *et seq.*, under the title of guardian and ward.

As to the other errors assigned, we briefly notice them.

A trial by agreement of parties, without an issue, is a waiver of an issue.

The complaint states a cause of action. *Covey v. Neff*, 63 Ind. 391; *The State, ex rel., v. Sanders*, 62 Ind. 562; *Voris v. The State, ex rel.*, 47 Ind. 345; *Hudson v. The State, ex rel.*, 54 Ind. 378.

. The judgment in the cause was properly rendered. 2 R. S. 1876, p. 592, sec. 13, note 2.

Cogswell has not appealed from the judgment against him, and the sureties made no such objection to the judgment or its rendition against them, as is stated in the seventh assignment of error. No available error is shown. *Doherty v. Chase*, 64 Ind. 73.

But we have already spent more time upon this case than, in the state of the record, we were required to. As we have seen, there is no bill of exceptions in the record, nor is the motion for a new trial.

A motion for a new trial in civil cases must be in writing, and must be filed at the term the verdict or finding of the court is rendered or made. 2 R. S. 1876, p. 183;

John Hancock Mutual Life Ins. Co. v. Daly.

Greenup v. Crooks, 50 Ind. 410; *Wilson v. Vance*, 55 Ind. 394; *Myers v. Jarboe*, 56 Ind. 57; *Hinkle v. Margerum*, 50 Ind. 240.

The judgment is affirmed, with costs.

JOHN HANCOCK MUTUAL LIFE INS. CO. v. DALY.

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LIFE INSURANCE POLICY.—*Application for.*—*Answer to Question.*—*Habits of Assured.*—*Waiver.*—In the application for a policy of insurance upon his life, the applicant, in reply to the double question "What are your habits in respect to the use of intoxicating liquors? have you ever used intoxicating liquors to excess?" answered "temperate," whereupon a policy was issued to him, containing a clause declaring that it was issued "in consideration of the representations made" in the application, "on the faith of which this policy is written," and also containing a condition, that, "if any of the * answers * made in the application * shall be found in any respect untrue, then this policy shall be * void." An action having been brought upon such policy, the only defence relied upon was that such answer of "temperate" was false.

Held, that the answer referred only to the habits of the applicant, at the time the application was made, and that further answer to such question was waived by the company by issuing the policy.

SAME.—*Instruction.*—*Burden of Proof.*—*Evidence.*—It was proper to instruct the jury trying such cause, that the only issue before them was whether or not the answer was true when made; that, if true, they should find for the plaintiff, but, if untrue, for the defendant; that evidence of previous intemperate habits could only be considered in determining the truth of the answer when made; and that the burden of proof of the alleged untruth was upon the defendant.

SAME.—*Answers to Interrogatories.*—Answers to interrogatories put to the jury in such case, finding that the habits of the assured were "temperate," at the time of the application, though previously "intemperate," support a general verdict for the plaintiff.

SAME.—*Admissions as to Previous Habits.*—*Evidence.*—Admissions made by the assured, previous to his application, that he was then intemperate, were incompetent evidence under the issue in such action.

From the Marion Superior Court.

G. H. Chapman and U. J. Hammond, for appellant.

F. M. Finch and J. A. Finch, for appellee.

NIBLACK, J.—This was an action by Mary A. Daly, against the John Hancock Mutual Life Insurance Company, upon a life policy issued to her late husband, Eugene Daly, for her benefit.

The complaint alleged, amongst other necessary averments, that Eugene Daly had died on the 19th day of February, 1877, of which the company had notice.

The application of the said Eugene Daly, for the policy in suit, was made on the 2d day of May, 1876, and contained, with other things, the following stipulation, "and, as the basis of such insurance, make the following statements, including those made to the medical examiner, which it is hereby mutually agreed shall form a part of the contract for this insurance." Also this question and answer thereto :

"11. Are you aware that any untrue and fraudulent answers to the above questions, or any suppression of facts with regard to your health, will vitiate the policy?"

"Ans. Yes."

Such application also contained the two-fold question :

"What are your habits in respect to the use of intoxicating liquors? Have you ever used intoxicating liquors to excess?" To which was answered, "Temperate."

The policy issued as above, upon this application, contained the clause: "in consideration of the representations made to them" (the company) "in the application for this policy, on the faith of which this policy is written," and the condition, "if any of the statements, answers or declarations made, in the application for this policy, shall be found in any respect untrue, then this policy shall be null and void, which application is hereby referred to, and made a part of, this policy."

The defendant answered, setting up, in connection with other matters in defence, that, at the time the application

John Hancock Mutual Life Ins. Co. v. Daly.

for the policy sued on was made, to wit, the 2d day of May, 1876, the said Eugene Daly was a man of intemperate habits in respect to the use of intoxicating liquors. Wherefore it was alleged, that said policy was null and void.

Issue being joined, the cause was submitted at special term to a jury for trial, and the jury returned a general verdict, together with answers to special interrogatories submitted to them, as follows:

"We, the jury, find for the plaintiff, and assess her damages at two thousand and seventy dollars.

"ROBERT B. BARBEE, Foreman."

"The jury also at this time return the following answers to interrogatories propounded by plaintiff:

"Were not the habits of Eugene Daly with respect to the use of intoxicating liquors at the time the policy in suit was applied for, temperate?

"Answer. Yes. ROBERT B. BARBEE, Foreman."

"And the jury also at this time return the following answers to interrogatories propounded by the defendant:

* * * * *

"1st. Was Eugene Daly" (the insured in the policy in suit) "in the habit, at and before the 2d day of May, 1876, of getting on sprees from the excessive use of intoxicating liquor?

"Ans. Yes, before; but, at time of application, temperate.

"2d. What were the habits of Eugene Daly, at and before the 2d day of May, 1876, in respect to the use of intoxicating liquor?

"Ans. In the habit of using liquors; but, at time of application, temperate.

"3d. Was not Eugene Daly, at and before the 2d day of May, 1876, in the habit of using intoxicating liquors intemperately?

John Hancock Mutual Life Ins. Co. v. Daly.

“Ans. He was ; but, at time of application, temperate.

“4th. Had not Eugene Daly, before the 2d day of May, 1876, used intoxicating liquors to excess?

“Ans. Occasionally he did.

“5th. Had not Eugene Daly, before the 2d day of May, 1876, used intoxicating liquors intemperately?”

“Ans. At times he did.

“ROBERT B. BARBEE, Foreman.”

Thereupon the defendant moved for judgment in its favor upon the answers of the jury to the special interrogatories above set out, notwithstanding the general verdict, but that motion was overruled.

The defendant then moved for a new trial, but that motion was also overruled, and judgment was rendered in favor of the plaintiff, upon the general verdict.

The defendant appealed to the general term of the court below, where the judgment at special term was affirmed.

Objections are urged here :

1. To the instructions given to the jury upon the trial ;
2. To the refusal of the court to render judgment in favor of the appellant, upon the answers of the jury to the special interrogatories submitted to them ;
3. To the sufficiency of the evidence to sustain the verdict of the jury.

On the trial, the only question really in controversy was as to what were the habits of Eugene Daly in respect to the use of intoxicating liquors, on the 2d day of May, 1876, the date of his application for the policy in suit, and there was evidence tending to show, that, during several years previous to that time, he had, at least occasionally, used intoxicating liquors to excess.

At the proper time the court, upon its own motion, instructed the jury, that—

“The sole question of fact, which is submitted for your determination, is, was the answer, ‘temperate,’ made by

John Hancock Mutual Life Ins. Co. v. Daly.

Eugene Daly, on the 2d day of May, 1876, to the question in the application for insurance, 'What are your habits in respect to the use of intoxicating liquors?' a true or false answer. If the answer was true, you should find for the plaintiff; if it was untrue, you should find for the defendant. The language of the question, and also the answer made, is to be considered as used in the common and ordinary sense. The words referred to have, as here used, no technical or extraordinary meaning. You will therefore consider the testimony before you, with this sole inquiry in view.

"The burden of proof is on the defendant to establish, by a preponderance of the evidence, that the answer to the question was untrue.

"The evidence before you, respecting the use by Daly of intoxicating liquors prior to the date of the application, is to be considered solely for the purpose of enabling you to determine whether at that date Daly was of temperate habits in respect to such use; and it is for you to say what bearing such evidence may have in relation to that inquiry."

Some criticisms are made upon the phraseology of the last clause of these instructions, but in our judgment no valid objection has been shown to that clause or to any portion of the instructions. These instructions appear to us to have fairly presented the law, as applicable to the evidence as it went to the jury. We see nothing in them of which the appellant has reason to complain.

Neither do we see any thing in the answers of the jury to the special interrogatories, which impresses us as inconsistent with the general verdict. In all their answers to these interrogatories, the jury tenaciously adhered to their conclusion, that, at the time of his application for the policy upon his life, Eugene Daly was a man of temperate habits, with reference to the use of intoxicating liquors, and that

conclusion was in harmony with and supported the general verdict.

The second clause of the two-fold question, embraced in the application and addressed to the said Eugene Daly, as above set out in this opinion, had reference to his previous habits, but an answer to that branch of the question seems to have been designedly, and was in effect, waived by the appellant.

Whatever, therefore, the jury may have found in relation to such previous habits of the said Daly, was irrelevant and immaterial to the real issue in the cause, and could not be used to antagonize the general verdict.

The evidence took a very wide range as to the time covered by it, and was in many respects conflicting. We can not say that the case is an entirely satisfactory one upon the evidence. But there was evidence fairly tending to sustain the conclusion reached by the jury. Under such circumstances, we can not enter into an estimation of the apparent weight of the evidence, for the purpose of reviewing the action of the jury. *The Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264.

Upon the trial the appellant propounded to one of the witnesses the following question :

“I will ask you if you did not, a great many times, talk to him (Daly) about his habits of drinking, and tell him he must quit, or you would discharge him, and if he did not confess to you that he had drunk too much, and promise to quit?”

The court refused to permit the witness to answer this question, and we see no error in such refusal. Waiving all other objections to the question, it was too indefinite and uncertain as to the time of the supposed conversations inquired about.

Another witness, a physician, testified upon the trial, in

 Hyatt v. Clements.

substance, that, probably a year, and possibly two years, before the policy sued on was issued, Eugene Daly consulted him as to his, Daly's, physical condition, seemingly suffering at the time from a nervous prostration brought on by a too free use of alcoholic stimulants.

The appellant then asked the witness to "state what, if any thing, he, Daly, said in this conversation he had with you, as to his seeing things."

The court also refused to permit the witness to answer that question, and we can not say that the court erred in so refusing. The time at which the conversation referred to occurred was too remote, from the time of Daly's application for the policy of insurance, to render such conversation either imperatively or necessarily admissible in evidence under the issue submitted to the jury. We have not considered whether the question might, or might not, have been a proper one under other and different circumstances, as such an inquiry was not necessary to a proper decision of this case.

In our opinion no sufficient reason has been assigned for a reversal of the judgment.

The judgment is affirmed, at the costs of the appellant.



HYATT v. CLEMENTS.

NEW TRIAL.—*Cause.*—*Assignment of Error.*—*Practice.*—Error which is merely cause for a new trial can not properly be assigned as error, in the Supreme Court, on appeal.

OPEN AND CLOSE.—*Burden of Proof.*—*Promissory Note.*—*Attorney's Fees.*—*Pleading.*—In an action upon a promissory note containing a stipulation for a reasonable attorney's fee, wherein the complaint demanded a certain sum, alleged to be reasonable, as the attorney's fee, the defendant,

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 Hyatt v. Clements.

for the purpose of obtaining the right to open and close the cause, in which he had otherwise set up affirmative defences only, answered admitting that the plaintiff was entitled to recover, as an attorney's fee, a sum bearing the same proportion to the amount otherwise recovered, as the sum demanded therefor bore to the total amount of the note, on its face, at the commencement of the action.

Held, on demurrer, that the answer is insufficient, that the burden of proof is upon the plaintiff, and that he is entitled to the open and close.

SUPREME COURT.—*Objection to Evidence.*—*Record.*—*New Trial.*—*Practice.*

—Where the record, on appeal, does not show that the grounds of an objection made to the admission of evidence were stated to the court where it was made, it will not be considered by the Supreme Court.

SAME.—*Truth of Error Alleged.*—*Bill of Exceptions.*—Where the truth of matter alleged as cause for a new trial does not appear by a bill of exceptions, the Supreme Court will not consider it.

PAYMENT.—*Application of.*—*Promissory Notes Maturing at Different Times.*

—*Statute of Limitations.*—*Credibility of Witness.*—*Instruction.*—In an action by the payee, against the maker, on several promissory notes maturing at different times, wherein the defendant alleged and testified that he had paid the note which had first matured to the plaintiff's husband, on her request, the court, in its instructions to the jury as to the application of certain other payments made to the plaintiff, instructed them, that, if they did not believe that such note had been paid, and if no application of such other payments had been made by either party, they should be first applied on that note.

Held, the jury possibly disbelieving such witness, that the instruction was proper.

SAME.—*Money Paid to Third Person, on Request.*—It appearing from the evidence in such action, that the defendant was surety on a claim against the estate of the payee's deceased husband, of which she was the administratrix, and that he was entrusted by her with the assets and business of such estate, it was proper to instruct the jury, in relation to a payment which the defendant alleged and testified he had made, out of the notes in suit, on her request, upon such claim against the decedent, that it was incumbent upon the defendant to establish, by a preponderance of the evidence, that such request was to make the payment out of money owing to her individually.

SAME.—*Land Purchased by Maker, on Payee's Request.*—*Trusts.*—Where, in such case, the defendant sought to obtain a credit on the notes for money alleged to have been paid by him, on the request of the plaintiff, for lands purchased by, and conveyed to, the defendant, for the plaintiff, the court instructed the jury, that, if such purchase was made pursuant to an agreement that the defendant should take the conveyance in his own name, and pay for the same out of the money he owed the plaintiff, such payment should

Hyatt v. Clements.

be credited on the notes as of the date it was made, but that, if the purchase was made without any agreement that payment therefor should be made out of the money owing to the plaintiff, or without her request, knowledge or consent, or an unreasonable time after such request, and without notice to the plaintiff, it should not be allowed as a credit.

Held, that the instruction was proper.

SAME.—*Instruction on Failure to Answer Interrogatories.*—On failure of a jury to answer some of certain interrogatories the court explained the interrogatories and directed them to be answered fully, "even if it required a re-examination of the whole case, and had the effect to change their general verdict."

Held that the instruction was proper.

SAME.—*Failure to Except.—Waiver.*—A failure to except to the giving of an instruction, at the time it is given, waives all objection thereto.

From the Pike Circuit Court.

W. R. Gardiner and W. Armstrong, for appellant.

J. H. O'Neill and D. J. Heffron, for appellee.

Howe, C. J.—This was an action by the appellee, as plaintiff, against the appellant, as defendant, to recover the amount alleged to be due on two promissory notes.

The appellee's complaint was in two paragraphs, each of which counted upon a different note. The notes were both executed by the appellant, and were payable to the appellee.

In the first paragraph of her complaint, the appellee sued on a note for forty-five hundred dollars, dated January 28th, 1868, payable one day after date, without relief, etc., with ten per cent. interest from date, and containing a stipulation, that, "If this note should be collected by suit, the judgment shall include the reasonable fee for plaintiff's attorney. The appellee averred in said paragraph, *inter alia*, that a reasonable fee for her attorneys was five hundred dollars, which she asked might be included in her judgment.

The note sued upon in the second paragraph of the complaint was for two hundred dollars, dated May 19th, 1857, and payable on or before the 25th day of De-

Hyatt v. Clements.

cember next, to the appellee, by her then name of Glenn McJunkins, "without regard to stay or value laws."

The action was commenced in the Daviess Circuit Court, but afterward, on the appellant's application, the venue thereof was changed to the court below.

The appellant answered in six paragraphs, to the first five of which paragraphs the appellee replied in four paragraphs, the first of which was a general denial.

On the appellant's motion, the court struck out the third paragraph of reply, and to the fourth paragraph of said reply the appellant's demurrer was sustained by the court.

The appellee demurred to the sixth paragraph of the answer, upon the ground that it did not state facts sufficient to constitute a defence to her action, which demurrer was sustained by the court, and to this decision the appellant excepted.

The issues joined were tried by a jury, and a general verdict was returned for the appellee, assessing her damages in the sum of five thousand three hundred and forty-three dollars and ninety-five cents, and her attorneys' fee in the sum of one hundred and eighty-three dollars and sixty cents. With their general verdict, the jury also returned into court their special findings on particular questions of fact, submitted to them by the parties, under the direction of the court; but, as there was no motion for judgment on these special findings, we need not set them out in this opinion.

The appellant's motion for a new trial was overruled, and to this ruling he excepted and appealed to this court.

The appellant has properly assigned, as errors, the following decisions of the circuit court:

1. In sustaining the appellee's demurrer to the sixth paragraph of his answer; and,
2. In overruling his motion for a new trial.

Hyatt v. Clements.

The appellant has also assigned, as errors, a number of causes for a new trial. But causes for a new trial, as we have often decided, are not properly assignable as errors; and, when thus assigned, they present no questions for our decision. *Buskirk Prac.*, p. 126, and authorities cited; *Freeze v. DePuy*, 57 Ind. 188; and *Walls v. The Anderson, etc., R. R. Company*, 60 Ind. 56.

1. In the sixth paragraph of his answer, the appellant, for answer to so much of the first paragraph of the appellee's complaint as related to her attorney's fees, said that the amount demanded for that purpose was six and two-thirds per cent. of the full amount of said note to the date of the filing of said paragraph, to wit, May 26th, 1876, which, the appellee averred, was due and unpaid; and the appellant admitted, that, as to whatever sum might be found due the appellee, the said per centum thereof, or a sum in the same proportion as five hundred dollars was to the full amount of said note, was a reasonable fee for the appellee's attorneys.

In discussing the sufficiency of this paragraph of answer, the appellant's learned attorneys, in their brief of this cause in this court, make use of this language: "It may be observed, that this plea was intended for the double purpose of avoiding the necessity of testimony to prove the value of the attorney's fees, and thereby to secure to appellant the right of the burthen, and to open and close on the trial." This latter purpose, we may fairly assume, without injustice to the appellant or his counsel, was the controlling one which prompted the filing of this sixth paragraph of answer. It seems to us that the paragraph was bad for any purpose, and that the appellee's demurrer thereto was correctly sustained. So far as the attorney's fees were concerned the appellee did not seek to recover a percentage on any sum, but she alleged, that the fees were reasonably worth the gross sum of five hundred dollars. In a litigated case, where the amount of the recovery is uncer-

tain, a percentage on such amount is not a reliable criterion for the measurement of a reasonable attorney's fee. The appellee had the right to aver, and to prove the averment if not admitted, that a reasonable attorney's fee would be, without regard to the amount of recovery, the sum of five hundred dollars. The admission as to the attorney's fees, in the sixth paragraph of the appellant's answer, was based upon a rule which the appellee had not adopted in her complaint, and which neither the court nor the appellant could require her to adopt. Under the allegations of her complaint, the appellee had the burthen of the issue to prove that the fees of her attorneys were reasonably worth the sum of five hundred dollars; and an admission by the appellant, that a certain percentage on the amount of the recovery would be a reasonable attorney's fee, is not such an admission of the allegations of the complaint, as would relieve the appellee from the burthen of proof. This point is settled adversely to the appellant's position, and we think correctly so, in the case of *Camp v. Brown*, 48 Ind. 575.

In our opinion, the court did not err in sustaining the appellee's demurrer to the sixth paragraph of the appellant's answer.

2. In his motion for a new trial of this action, the appellant has assigned many causes therefor, consisting chiefly of alleged errors of law, occurring at the trial. We will consider such of these causes for a new trial as the appellant's counsel have presented and discussed in their well considered brief of this cause in this court. In so doing, we will take up these causes in the same order in which counsel have presented them.

On the trial of the cause, the appellant moved the court for leave to make the opening statement to the jury, and the opening and closing arguments, and to assume the bur-

Hyatt v. Clements.

then of the issues, which motion was overruled by the court, and to this ruling he excepted.

What we have said in relation to the insufficiency of the sixth paragraph of the answer is decisive of the question now under consideration. The appellee, as we have seen, had the burthen of the issues, and it followed therefrom that she had the right to open and close the case to the jury. This is settled law in this State, both under the practice act and by the decisions of this court 2 R. S. 1876, p. 166, sec. 324; *Tull v. David*, 27 Ind. 377; *Hamlyn v. Nesbit*, 37 Ind. 284; and *Heilman v. Shanklin*, 60 Ind. 424. The appellant's motion was correctly overruled.

On the trial, the appellee was a witness in her own behalf; and, while on the witness stand, her counsel asked her this question:

"State whether, at any time, you gave Mr. Hyatt any authority to pay the Pearson debt?"

To this question, we learn from the bill of exceptions, "the defendant, by his attorneys, at the time objected, which objection was overruled by the court, to which said ruling the defendant at the time excepted," and the appellee was allowed to answer the question. The record fails to show that the appellant stated to the circuit court the grounds of his objection to the question. In such a case, the rule is well settled, that this court will not, on appeal, consider the question of the admissibility of the evidence, nor any objections here to its admission. *Bishplinghoff v. Bauer*, 52 Ind. 519; *Rosenbaum v. Schmidt*, 54 Ind. 231; and *McCormick v. Mitchell*, 57 Ind. 248.

The next point presented by the appellant's counsel, in argument, arises under the tenth alleged error of law occurring at the trial, which was thus stated in the motion for a new trial:

"That the court erroneously required defendant to insert, in his first and second interrogatories, the words, 'out of

Hyatt v. Clements.

money coming to her on his note,' before it would submit said interrogatories to the jury."

Very singularly, as it seems to us, the bill of exceptions, which to us imports absolute verity, wholly failed to show that the court required the appellant to insert the words mentioned, in either of said interrogatories, or that he objected to any such requirement, or that the court overruled any such objection, or that he excepted to any such ruling. In so far, therefore, as this alleged error of law is concerned, the motion for a new trial is not sustained by the bill of exceptions. In this court, the statement of facts, in a motion for a new trial, is not regarded as true, unless the truth thereof is shown by a bill of exceptions properly in the record. *Skillen v. Skillen*, 41 Ind. 122; *Hopkins v. The Greensburg, etc., Turnpike Co.*, 46 Ind. 187; *Wiler v. Manley*, 51 Ind. 169; *Graeter v. Williams*, 55 Ind. 461. The question discussed by counsel is not shown by the record, and therefore is not properly before us.

The next alleged error, complained of by the appellant's attorneys, in this court, was the instructions of the circuit court to the jury trying the cause. There were four of these instructions, and to each of them the record shows that the appellant objected and excepted. We will briefly consider these instructions, and the objections of counsel thereto, in the order in which they were given.

The first instruction was as follows:

"1. If you believe from the evidence, that the smaller of the notes sued on had not been paid to R. A. Clements, in his lifetime, with plaintiff's knowledge or consent, and that the defendant gave no directions that the payments made to the plaintiff should be applied on the large note, and the payments made were not applied by the plaintiff, then you should apply so much of the first payments made by the defendant, as will be sufficient, to pay the said small note, it being the older of the two, and sooner barred by the statute of limitations."

Hyatt v. Clements.

The objection of counsel to this instruction is, "that there was no evidence in the case that tends to show that the small note, or any part of it, was ever paid in any other way, except as stated in the testimony of the appellant." This objection, if such it may be termed, is not well taken. It is true that the appellant had testified to his payment of "the smaller note, in cash, \$100.00, and the residue in building material, in the lifetime of appellee's husband, R. A. Clements, and at no other time and in no other way." If the jury believed this testimony of the appellant, then the smaller note was paid and out of the case. But the jury might not believe the appellant's testimony on this point; and therefore it was right and proper for the court, as it seems to us, to instruct the jury, if they believed that the smaller note had not been paid to R. A. Clements, in his lifetime, and payments had been made, without directions by the appellant as to their application, and without application by the appellee, how they, the jury, should appropriate or apply the payments thus made, upon the notes in suit. The objection of the appellant's attorneys to the first instruction of the court, in our opinion, was not well taken, and was properly overruled.

The second instruction of the court to the jury was as follows:

"2. If you believe from the evidence, that the defendant has not made out, by a preponderance of the evidence, that the plaintiff had requested him to pay the Pearson claim out of her money, then you should find for the plaintiff on defendant's plea involving that issue, and should answer the first interrogatory, propounded by the defendant, in the negative; but, if you should find that the plaintiff requested the defendant to pay the amount due from Richard A. Clements, as commissioner in the Pearson partition suit, out of her money, then you should find for the defendant upon that issue, and allow the

Hyatt v. Clements.

amount paid by Hyatt as a credit upon the note, as of the date it was paid by him, and should answer said interrogatory in the affirmative."

The only objection urged by the appellant's counsel to this instruction is, that it in substance informed the jury, that the mere verbal request by the appellee of the appellant, that he would pay the Pearson claim against her deceased husband's estate, would not subject her to a personal liability for the amount of such payment, unless she had requested that it should be made "out of her money" in the appellant's hands. There was no error in this instruction; but it seems to us to have been eminently just, right and proper. The appellant was the step-father of the appellee, had become such when she was a tender infant of but three years of age, and had reared her from infancy to womanhood. When bereft of her husband, it was natural that the appellee should turn to the appellant, the only father she had ever known, for counsel, advice and assistance. She loaned him her money, and received therefor his note, described in the first paragraph of her complaint. She became the administratrix of the estate of her deceased husband; but the evidence showed that she entrusted the business and assets of said estate to her father, the appellant. The Pearson claim was not a claim against the appellee personally, but only, if at all, in her fiduciary or representative character of administratrix. While this is so, it appears from the record, that the claim in question was a personal claim or demand against the appellant, as the surety of the decedent, Richard A. Clements. Under such circumstances, it seems to us, that, if the appellee requested the appellant to pay the Pearson claim, the presumption would be, the contrary not appearing, that the request was made by her, as administratrix. We are clearly of the opinion, that the appellee ought not to have been chargeable with, or responsible for, the amount paid by the appellant, in discharge of the Pearson

Hyatt v. Clements.

claim, unless and until it had been shown by a preponderance of the evidence, that she had requested such payment to be made out of her own money in the appellant's hands.

The same objection, and none other, is presented by the appellant's attorneys to the fourth instruction, as to the second instruction. For the reasons given, we think that no error was committed by the court, in giving the jury the said two instructions, or either of them.

The third instruction of the court to the jury was as follows :

" 3. If there was an agreement between the plaintiff and defendant, that the defendant, Hyatt, should purchase the strip of land from Wildridge, and pay for the same out of the money of the plaintiff and take the deed in his own name ; if, in pursuance of such agreement, he did buy the land and pay for the same out of the money due the plaintiff, and took a deed in his own name ; then he would hold the land in trust for the plaintiff, and she would be the equitable owner, and would be chargeable with the amount he paid for the land, and you should allow the sum paid, as a payment on the note, as of the date it was paid by Hyatt ; but, if there was simply a request by the plaintiff of the defendant to buy the strip of land, and no agreement that it should be paid for out of the money of the plaintiff, and that Hyatt should take the deed in his own name, and thereafter Hyatt did buy the land and take the deed in his own name, she could not be compelled to take a deed from him now ; and in that event you could not allow the amount so paid as a credit on plaintiff's note ; or, if there was a request by the plaintiff for the defendant to buy the land, even though you might infer that the request was to pay therefor, out of money due from defendant to plaintiff, if, after the lapse of an unreasonable length of time, without any further under-

Hyatt v. Clements.

standing or request from the plaintiff, the defendant did buy the land and take the deed in his own name, in that event you could not allow the amount so paid as a payment on the note. If Hyatt paid for the lot and took the deed in his own name without her knowledge or consent, she can not be compelled to take a deed from him, and allow the amount paid as a payment on her note."

Of this instruction the appellant's counsel say: "We hardly think the third instruction complained of states the law fairly under the issues of this case." We think otherwise. It seems to us, that the instruction contains a full, fair and correct statement of the law applicable to so much of the appellant's defence of this action as sought to obtain a credit on the notes in suit, as a payment to the appellee, or to charge her, by way of set-off, by and with the amount paid by the appellant, in the purchase of the Wildridge strip of land. If the appellee was properly chargeable with the amount paid by the appellant, in the purchase of the Wildridge lot, the appellant would get credit for the amount so paid, under the instruction of the court, whether it was pleaded as payment, or as a set-off for money paid at appellee's request. The instruction was applicable alike to an answer of set-off or a plea of payment; and it seems to us, that the jury could not have been misled nor the appellant harmed thereby.

The last alleged error, complained of in argument by the appellant's attorneys, relates to an instruction of the court to the jury, after they had returned a general verdict and answers to some of the questions of fact submitted to them by the parties. It appears from the bill of exceptions, that the court then instructed the jury as follows:

"That they had failed to answer the interrogatories propounded by the plaintiff, and to fully answer those propounded by the defendant; and after explaining said inter-

Hyatt v. Clements.

rogatories, the court stated to the jury, that they should answer the interrogatories propounded by the plaintiff, and answer fully those propounded by the defendant; then they should make their general verdict consistent with their answers to the interrogatories, even if it required a re-examination into the whole case, and had the effect to change their general verdict."

It is very certain, we think, that the appellant can not complain, in this court, of this alleged error; for the record fails to show, that he either objected or excepted to the action or instruction of the circuit court in the premises. In section 343 of the practice act, it is provided, that "The party objecting to the decision must except at the time the decision is made." 2 R. S. 1876, p. 176. And this statutory rule of practice has been recognized, and followed by this court, ever since the adoption of our code.

In Buskirk's Practice, p. 289, it is said: "It is firmly settled that unless an exception is taken and entered upon the record in the manner prescribed by statute, at the time the decision is made in the court below, the objection is waived, and the record presents nothing for the determination of the Supreme Court." See, also, the authorities there cited.

In the case at bar, as we have seen, the appellant neither objected nor excepted, at the time, to the action and instruction of the circuit court, now complained of. His objection comes too late, and must be regarded as waived; and, as to the matter now under consideration, the record presents nothing for our determination. Besides, it seems to us, that the action and instruction of the court, complained of by the appellant, as the same are set forth in the record, were not open to objection of any kind, but were fully authorized by law.

We have now examined and passed upon all the questions presented and discussed by the appellant's counsel;

Duke *v.* Brown *et al.*

and our conclusion is, that no error was committed by the court below, in overruling the appellant's motion for a new trial.

We find no available error in the record of this cause.

The judgment is affirmed, at the appellant's costs.

Petition for a rehearing overruled.

CRANMORE *v.* BODINE ET AL.

SUPREME COURT.—*Appeal.—Notice.—Dismissal.*—An appeal to the Supreme Court, by one only of several co-parties, without giving notice to the others, will be dismissed.

From the Fountain Circuit Court.

M. Milford, for appellant.

S. M. Cambern and *L. Nebeker*, for appellees.

WORDEN, J.—In this case there was a judgment below, in favor of the appellees, against the appellant, Cranmore, and one William C. Ward, jointly.

The appellant has assigned errors in his own name only as appellant, and Ward has not been notified of the appeal, as required by the statute. 2 R. S. 1876, p. 239, sec. 551.

The appellees have suggested that, for this reason, the appeal ought to be dismissed.

The point is well taken, and the appeal should be dismissed.

The appeal is dismissed, at the costs of the appellant.

Petition for a rehearing overruled.

DUKE *v.* BROWN ET AL.

TAX TITLE.—*Interest on Taxes Paid by Holder.*—Under section 257 of the act of December 21st, 1872, 1 R. S. 1876, p. 72, relating to the assessment

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| 65 | 25 |
| 132 | 109 |
| 65a | 95 |
| 139 | 53 |

Duke v Brown *et al.*

of taxes, the holder of an invalid tax title is entitled to interest at the rate of twenty-five per cent. per annum on all taxes paid by him on the lands covered by the tax title.

From the Howard Circuit Court.

J. C. Blacklidge and *W. E. Blacklidge*, for appellant.

C. E. Hendry, for appellees.

BIDDLE, J.—Suit by appellant, against the appellees, to quiet the title to certain real estate.

No question is presented on the pleadings.

Trial and finding by the court.

No question is presented, except such as arose under the motion for a new trial, one assigned cause for which was, that the finding of the court was contrary to the evidence.

The trial was had upon an agreed statement of facts, which shows that the appellant claimed title under tax deeds. The court found against him as to his title, and decreed the title to be in one of the defendants. Of this the appellant does not complain, but admits that he failed upon his title.

It appears, however, by the statement of facts admitted, that the appellant had paid a certain amount of taxes upon the land, for which he claimed to be reimbursed, with interest, if he failed in his title. This the court denied him.

Under section 257, 1 R. S. 1876, p. 129, and according to the decision in the case of *Flinn v. Parsons*, 60 Ind. 573, we think the court erred. Upon the failure of his title, the appellant was entitled to his money back, with interest at the rate of twenty-five per cent. per annum.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

Hayes *et al.* v. Brubaker.

HAYES ET AL. v. BRUBAKER.

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PROMISSORY NOTE.—*Principal and Agent.*—*Church Trustees.*—A promissory note in the form "we promise to pay," etc., executed by the makers in their individual names, with the addition of the words "Trustees of the" etc., "Church," is the note of the makers individually, and can not be varied by a defence involving parol evidence, shifting the liability to the makers as church trustees.

From the Kosciusko Circuit Court.

C. Clemans and J. H. Taylor, for appellants.

J. H. Carpenter and J. W. Cook, for appellee.

NIBLACK, J.—This was a suit by Susannah Brubaker, against William Hayes, Samuel Galbreath and Joseph H. Taylor, administrator of the estate of George W. Ryerson, deceased, upon a promissory note, as follows:

"\$429.98.

PIERCETON, December 24th, 1870.

"Twelve months after date we promise to pay to the order of Susannah Brubaker four hundred and twenty-nine and $\frac{9}{100}$ dollars, payable at —, value received, without relief from valuation laws, with interest at 10 per cent. per annum.

DR. WM. HAYES,

"G. W. RYERSON,

"S. GALBREATH,

"Trustees of the First Universalist Church of Pierceton."

The complaint was in three paragraphs, but the first was withdrawn before any proceedings were taken upon it.

Demurrers were overruled to the second and third paragraphs, the third being merely a complaint upon a promissory note in the usual form; but, as no question is made in this court upon the sufficiency of those paragraphs, we need not more particularly refer to them.

The defendants answered, averring that the First Universalist Church of Pierceton was a duly and legally incorporated body, with full power to contract and be con-

Hayes et al. v. Brubaker.

tracted with, and to sue and be sued, under the name and style of "The Trustees of the First Universalist Church of Pierceton, Indiana," and that such corporation was the owner of five thousand dollars' worth of property, out of which the money might be made to pay the note sued on; that such note was made in conformity to the rules of said church, and as a church note for money loaned to the church to build a church edifice; that neither the defendants Hayes or Galbreath nor the said Ryerson received or used any of the money so loaned on said note for his or their individual benefit, of all which facts the plaintiff had knowledge when the money was loaned; that the plaintiff loaned the money to the church, and took the note as a church note, and not as the individual note of the persons whose names are attached to it, and that the note was accepted and treated by all the parties to it when it was given as a church note, and not otherwise.

The plaintiff demurred to this answer, and the court sustained her demurrer.

The defendants refusing to answer further, the court assessed the plaintiff's damages at the amount due upon the note, principal and interest, and rendered judgment against the defendants for the amount thus found due, ordering, at the same time, that the judgment should stand as an allowance against the estate of the said George W. Ryerson.

The appellants claim that their answer to the complaint below, the substance of which is set out as above, made out a proper case for the admission of parol evidence to explain the purpose for which the note sued on was given, and that, in executing such note, the said Hayes, Galbreath and Ryerson acted as the representatives of the church organization merely, and not in their individual capacities; that it was the understanding, at the time, that the note was to be binding on such church organization only, and

Case v. Fowler.

not on the said Hayes, Galbreath and Ryerson personally; that there was an ambiguity upon the face of the note, which, of itself, rendered the admission of such parol evidence not only proper but necessary, and that hence the court erred in sustaining the demurrer to their answer.

The precise questions thus raised by the appellants have already been ruled upon by this court, and decided adversely to the positions assumed by the appellants.

In the cases of *Hays v. Crutcher*, 54 Ind. 260, and *Hayes v. Matthews*, 63 Ind. 412, notes precisely similar to the note in judgment in this case were held to be personally binding upon the persons signing them, and not susceptible of having any other effect given to them by parol evidence. Those cases were well considered, and the conclusions reached through them are still adhered to by us.

Upon the authority of those cases, the judgment in this case will have to be affirmed.

The judgment is affirmed, at the costs of the appellants.

CASE v. FOWLER.

Town.—*Street Improvement.*—*Notice of Letting.*—*Sunday.*—*Time.*—The board of trustees of an incorporated town, in advertising for proposals for certain street improvements, pursuant to the act of April 27th, 1869, 1 R. S. 1876, p. 890, caused a notice to be inserted in a public newspaper published on the 10th day of September, 1875, stating that proposals would be received up till "12 o'clock M. of Saturday, September 19th, 1875," but, the 19th being Sunday, the bids were opened, and the contract awarded, on the 18th, at 7:30 P. M.

Held, that the notice was sufficient to authorize the award.

From the Benton Circuit Court.

Case v. Fowler.

J. M. LaRue, F. B. Everett, M. H. Walker and — Smith,
for appellant.

D. E. Straight and U. Z. Wiley, for appellee.

WORDEN, J.—This was an action by Horace S. Case, against Moses Fowler, under the provisions of the act of April 27th, 1869, to enable incorporated towns to lay out, open, grade and improve streets and alleys, etc., 1 R. S. 1876, p. 890, to recover an assessment in favor of the former as a contractor, against the latter as a lot owner in the town of Fowler, for the expense of a street improvement.

Demurrer to the complaint for want of sufficient facts, sustained. and exception. Judgment for the defendant.

Error is assigned upon the ruling upon the demurrer.

The complaint, we think, states all the facts necessary to the plaintiff's right of recovery. It shows that the improvement was duly petitioned for, and that all the steps required by the statute were taken to authorize the work to be done at the expense of the adjoining property holders; that the work was duly let to the plaintiff, and has been performed by him to the acceptance of the board of trustees, and that the assessment has been duly made. Indeed, no objection is made to the complaint, save that the notice of the letting of the work was insufficient. The facts in relation to the notice are as follows:

On the 6th day of September, 1875, the board of trustees made an order that the clerk give notice of the letting of the work. On the 10th of the same month the following notice was published in "The Benton Democrat," viz.:

"NOTICE.

"Notice is hereby given that the board of trustees of the town of Fowler, Benton county, Indiana, will receive sealed bids for the improvement of Fifth Street, in said town of Fowler aforesaid, up to 12 o'clock M. of Saturday, September the 19th, A. D. 1875.

"Plans and specifications can be seen by calling upon the clerk of said town board. The board reserve the right to reject any or all bids. Attest," etc.

But September 19th, 1875, was Sunday.

On Saturday, the 18th day of that month, at half-past seven o'clock in the morning, the board of trustees met and opened and examined the bids, and, finding the plaintiff to be the lowest and best bidder for the work, the contract was awarded to him, and was drawn up and entered into on the 20th of that month.

There was evidently a mistake in the notice in naming Saturday as the 19th day of September, 1875.

And it is insisted by the appellee that the mistake entirely vitiated the notice. We, however, do not deem it of any importance. No one could have been misled by it. Any person having seen the notice would have seen that bids were to be received up to noon of Saturday; and he would reasonably have inferred that the Saturday intended was the one occurring the day before the 19th day of the month, and that by mistake it was called the 19th day of the month. He could not have reasonably inferred that the Saturday intended was any Saturday occurring after the 18th day of the month, because the first one after that date was the 25th day of the month, six days later than the date mentioned in the notice.

But suppose that the day of the month instead of the day of the week specified in the notice, should be held to control. The notice then might be read as if the day of the week had not been mentioned. It would then specify that bids would be received up to noon on the 19th day of September, 1875. But the 19th day being Sunday, no ordinary business could be legally transacted upon it; hence Saturday, the 18th day of the month, was the last day on which bids could be properly put in or received; and this must have been known to the bidders. The board of

Godman *et al.* v. Meixsel *et al.*

trustees, then, having waited until after the close of ordinary business hours of the last day on which bids could be properly put in or received under the notice, was justified in then opening and examining the bids and awarding the contract.

We think that the notice was sufficient.

The statute does not provide for notice for any specified length of time. The 8th section of the act above mentioned provides, that "the board of trustees may cause the same" (the improvement) "to be done according to the specifications by them to be adopted, by contracts given to the best bidder, *after advertising to receive proposals therefor.*"

The advertisement in this case was published eight days before the opening of the bids and awarding the contract, and this we regard as reasonable notice.

We think the court below erred in sustaining the demurrer to the complaint.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

GODMAN ET AL. v. MEIXSEL ET AL.

PRINCIPAL AND AGENT.—*Sale, through Agent, for Future Delivery.—Compromise by Agent.—"Options."—Broker.*—Certain grain dealers in this State having authorized certain commission merchants in another State to sell a certain quantity of grain, on the account of the former, at a specified price, to be delivered at the "option" of the former, to the purchaser, at any time during a specified month, and such sale, and partial delivery pursuant thereto, having been made, the sellers telegraphed to the commission merchants, thirteen days prior to the expiration of the month, to buy grain sufficient "to fill balance of our sale," whereupon the latter, on the next day, compromised the contract by paying to the purchaser the difference between the contract price and the market price of such grain at that time, but before the expiration of the month the market price had fallen.

Godman *et al.* v. Meixsel *et al.*

Held, in an action by the agents against their principals, to recover such compromise payment as money paid for the use of the principals, that they can not recover

From the Tippecanoe Circuit Court.

J. M. LaRue and *F. B. Everett*, for appellants.

W. D. Wallace and *A. A. Rice*, for appellees.

Howk, C. J.—This cause is now before this court, for the second time. The opinion of the court when it was first here is reported under its present title, in 53 Ind. 11.

The appellees, as plaintiffs, alleged in their complaint, that the appellants were indebted to the appellees in the sum of six hundred and eighteen dollars and ninety-six cents, for a balance due to them for money paid out and expended by the appellees for the appellants, at their instance and request, and for interest due the appellees, the particulars of which were set forth in an account filed with, and made part of, said complaint; that said balance was due and wholly unpaid; and that the appellees demanded judgment therefor, with interest thereon since November 1st, 1873, in the sum of seven hundred dollars, and for other proper relief.

Answers and replies were duly filed, and the action having been put at issue was tried by a jury, at the April term, 1877, of the court below, and a verdict was returned for the appellees, assessing their damages in the sum of seven hundred and fifty-two dollars and fifty-six cents. The appellants' motion for a new trial having been overruled, and their exception saved to such ruling, judgment was rendered on the verdict.

The following decisions of the circuit court have been assigned as errors by the appellants, in this court:

1. In overruling their motion for a new trial;
2. In overruling their motion to suppress certain depositions; and,
3. In refusing to permit them to introduce oral evi-

Godman et al. v. Meixsel et al.

dence in support of their motion to suppress certain depositions.

The only causes for a new trial, assigned by the appellants in their motion therefor, were, that the verdict was contrary to law, and that it was not sustained by the evidence. The questions presented by these causes for a new trial, for our consideration and decision, make it necessary that we should give at least a summary of the facts shown by the evidence.

In and during the year 1873, the appellees were commission merchants in the city of Baltimore, Maryland; and, in and during the same year, the appellants were engaged in the same business in the city of Lafayette, Indiana. On July 22d, 1873, by the appellants' authority and on their account, the appellees, at Baltimore, sold to one Radcliff twenty thousand bushels of corn, at fifty-nine cents per bushel, to be delivered during the ensuing month of August.

It was alleged by the appellees, in the third paragraph of their reply, that, "On or about the 16th day of August, 1873, the plaintiffs, at the instance and request of the defendants, procured said Radcliff to extend the time of the delivery of said corn, so as to make the same deliverable at any time during the whole of the ensuing month of September, at the defendants' option."

We do not find that this allegation is sustained by any positive evidence in the record, nor was it controverted in any manner. It may be assumed as a fact, therefore, without injustice to any of the parties, that the time of the delivery of the corn sold was so extended as that the appellants had all the month of September, 1873, in which at their option to make such delivery.

On the 17th of September, 1873, more than fourteen thousand bushels of corn were still to be delivered by the appellants on their sale to Radcliff, during the remainder of that month; and, on the day last named, they sent from

Lafayette to the appellees, at Baltimore, a telegraphic message, in these words: "Buy corn to fill balance of our sale." The telegram was received by the appellees, at Baltimore, on the same day it was sent. The market price of corn, in Baltimore, was then sixty-four cents per bushel. The appellees did not buy corn, as instructed by the appellants, to fill the balance of their sale to Radcliff; but, on the 18th day of September, 1873, without any further instructions from the appellants, the appellees paid Radcliff five cents per bushel on fourteen thousand three hundred and forty-seven and one-seventh bushels of corn, the amount then undelivered on the sale to him. On the same day, the appellees wrote the appellants, at Lafayette, that they had that morning bought the fourteen thousand three hundred and forty-seven and one-seventh bushels of corn, at sixty-four cents per bushel, on the appellants' contract of sale to Radcliff. It appears, from the deposition of the appellee Joseph H. Meixsel, in evidence on the trial of this cause, that, on the 27th day of September, 1873, which was three days before the expiration of the time within which the appellants were to complete the delivery of the corn sold on their account by the appellees to Radcliff, the market price of corn by the car-load, in Baltimore, was only sixty cents per bushel.

These were the facts of the case, as we gather the same from the record, and the question for decision is, were these facts sufficient to show that the appellants were liable to the appellees, in this action, for the money paid by the latter in the settlement of the contract with Radcliff?

The appellees' attorneys in the court below have failed to furnish us with any brief or argument of this cause, and we can not understand upon what grounds the circuit court overruled the appellants' motion for a new trial, and sustained the verdict of the jury. It seems to us, that the verdict was not sustained by sufficient evidence.

Godman et al. v. Meixsel et al.

In their complaint, the appellees sued for the recovery of a certain sum of money, which they alleged that they had paid out and expended for the appellants, and at their instance and request. In the first paragraph of the answer of the appellants to the complaint, "they deny each and every allegation thereof." The issues thus joined made it necessary for the appellees to prove on the trial, by a preponderance of the evidence, not only that they had paid out and expended the money, but that they had made such payment and expenditure at the instance and request of the appellants. On this latter point, the appellees introduced no evidence of any kind. They had been instructed by the appellants to buy corn to fill the balance of their sale to Radcliff. When the appellees received this instruction, they knew that, under the terms of the sale which they had made to Radcliff for the appellants, the latter might deliver the balance of their sale of corn, at their option, at any time within the next thirteen days. The appellees were authorized by the telegram to buy corn to fill the balance of the sale to Radcliff, and they knew they had thirteen days within which to buy and deliver the balance of the corn. The telegram did not authorize the appellees to pay money to and settle with Radcliff, for the balance of the corn; but the next morning after their receipt of the telegram, and twelve days before the expiration of the time within which, under the contract, as they well knew, the balance of the corn might be delivered, they settled with Radcliff for the undelivered balance of the corn, as upon a forfeited contract, at sixty-four cents per bushel, and paid him in money the difference between that price and the contract price of fifty-nine cents per bushel, or five cents per bushel. After the appellees had made this payment to Radcliff, and before the expiration of the time within which the balance of the corn, under the contract, might have been delivered to Radcliff, to wit, on the 27th day

Carter *et al.* v. Harter.

of September, 1873, the market price of corn, by the car-load, in the city of Baltimore, as shown by the account filed with, and made part of, the deposition of the appellee Joseph H. Meixsel, was only sixty cents per bushel.

Upon the case made by the record, we are clearly of the opinion, that the moneys sued for were not paid out and expended by the appellees, at the instance and request of the appellants. Not only so, but we think that such payment and expenditure, made at the time and under the circumstances above stated, were wholly unauthorized, and therefore that the appellants are not, and ought not to be, liable therefor to the appellees.

For the reasons given, the court erred, in our opinion, in overruling the appellants' motion for a new trial.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to sustain the appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

CARTER ET AL. v. HARTER.

EVIDENCE.—*Promissory Note.*—*Non Est Factum.*—On the trial of an action against co-makers, on a promissory note, wherein the execution of the note was denied by one of the defendants under oath, the plaintiff gave the note in evidence "as against the parties who do not deny the execution of the same under oath," followed by evidence of its execution by such defendant.

Held, that the evidence does not authorize a finding against him.

From the Madison Circuit Court.

J. W. Sansberry and *E. B. Goodykoontz*, for appellants.

W. R. Myers and *H. D. Thompson*, for appellee.

BIDDLE, J.—Suit on a joint promissory note alleged to

Carter et al. v. Harter.

have been made by Wesley S. Carter, William Silver and Joseph J. Carter, payable to the appellee, for four hundred dollars. The record does not inform us what became of Wesley S. Carter. There is no notice of him in the record, except his name in the complaint, and "W. S. Carter" signed to the note.

Joseph J. Carter answered by general denial, verified by his affidavit.

William Silver answered by several paragraphs.

Issues were formed, trial had by the court, and a finding rendered against William Silver and Joseph J. Carter.

Joseph J. Carter moved for a new trial. His motion was overruled. Silver and Joseph J. Carter both appeal to this court. The only question made here is upon the sufficiency of the evidence to sustain the finding.

The bill of exceptions informs us, that, at the trial, the appellee, "to maintain his cause of action, introduced the following evidence, to wit: The note sued on, offered in evidence as against the parties who do not deny the execution of the same under oath, and read in these words, to wit, '\$400,' etc.

It does not appear by the bill of exceptions, that the note was offered or received as evidence against Joseph J. Carter, who had denied the note under oath; nor does it appear that any evidence was offered to the court to prove the execution of the note as against Joseph J. Carter, as preliminary to offering it as evidence under the complaint. There is much evidence in the bill of exceptions tending to prove the execution of the note by Joseph J. Carter, given without objection under the complaint. When the note was offered in evidence against Silver only, Joseph J. Carter could not object to it; he could object to it only when offered against himself, or under the complaint generally. As it was not so offered, and not received as evidence against Joseph J. Carter, we can not hold that there is sufficient evidence before us to sustain the finding

Hughes et al. v. The State.

against Joseph J. Carter. This omission may have been, and probably was, an oversight, occurring in the pressure of business; but this excuse will not aid the record.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

THE LOUISVILLE, NEW ALBANY AND CHICAGO R. W. Co. v.
FRANCIS.

S. C. Willson and L. B. Willson, for appellant.

WORDEN, J.—Motion to re-tax costs.

We are of opinion that the docket fee of four dollars, provided for by the 5th section of the act of March 5th, 1859, 1 R. S. 1876, p. 775, can only be taxed to the losing party in this court; and that, whether it can be collected of him or not, the winning party can not be compelled to pay it.

Ordered accordingly.

HUGHES ET AL. v. THE STATE.

CRIMINAL LAW.—*Verdict.—Assault and Battery with Intent to Murder.*—

On the trial of A., B., C., D., E. and F., jointly indicted for assault and battery with intent to murder, the jury returned a verdict as follows, viz.: "We, the jury, find the defendants guilty as charged in the indictment, as follows:" A. "be confined in the state-prison eight years;" B. "seven years;" C. "four years;" D. "three years;" E. "two years;" F. "two years; and that each be fined one dollar."

Held, that the verdict was sufficiently certain.

SAME.—Instruction.—Natural Consequences of Act.—It was proper for the court to instruct the jury in such case, that, if the means used in committing the assault and battery upon the prosecuting witness were such as "would ordinarily and probably have produced death," they might find the defendants guilty of the alleged intent.

SAME.—Evidence.—Name.—The rule of evidence as to the names of defendants is not the same as it is as to the names of third persons, mentioned in an indictment.

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Hughes *et al.* v. The State.

SAME.—*Instruction.*—*New Trial.*—*Record.*—An instruction alleged to have been erroneously given, does not become part of the record on appeal to the Supreme Court, merely by being copied into the motion for a new trial.

From the Montgomery Circuit Court.

J. R. Courtney, for appellants.

T. W. Woollen, Attorney General, for the State.

PERKINS, J.—An indictment, as follows, was duly returned into the Montgomery Circuit Court:

The grand jurors of Montgomery County, in the State of Indiana, good and lawful men, duly and legally empanelled, sworn and charged in the Montgomery Circuit Court of said State, at the November term, for the year 1878, to inquire into felonies and certain misdemeanors, in and for the body of said county of Montgomery, in the name and by the authority of the State of Indiana, on their oaths do present, that one Robert J. Hughes, John Spray, Frank Armantrout, James Morgan, William Baldwin, John E. Shepherd, Joseph Farley and Samuel Stump, late of said county, on the 5th day of December, A. D. 1878, at the said county and State, did then and there, in a rude, insolent and angry manner, unlawfully touch, strike, cut, beat, bruise and wound one Archelaus Bailey, with the intent then and there and thereby, him, the said Archelaus Bailey, unlawfully, feloniously, purposely, wilfully and with premeditated malice, to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.

“GEORGE W. COLLINGS, Pros. Att’y.”

A motion to quash, for the reason that said indictment did not charge any “offence against the statute law of said State,” was overruled, and the defendants excepted.

Thereupon said defendants, except William Baldwin, being arraigned upon said indictment, each for himself, for plea thereto, says he is not guilty as charged therein.

Hughes et al. v. The State.

A jury was empanelled, the issue was tried, and a verdict as follows returned :

"We, the jury, find the defendants guilty as charged in the indictment, as follows: Robert J. Hughes be confined in the state-prison eight years; John Spray, seven years; Frank Armantrout, four years; John E. Shepherd, three years; Joseph Farley, two years; Samuel Stump, two years; and that each be fined one dollar.

"ROBERT T. BECK, Foreman."

The defendants moved for a new trial, for the following reasons:

1. The verdict is contrary to law;
2. It is unsustainable by the evidence; and,
3. For error of law occurring at the trial, in this, to wit, the court instructed the jury thus:

"A person is presumed to intend the necessary and probable consequences of his own act; and, if you believe, from the evidence, that the means used in the commission of the assault and battery upon the prosecuting witness, Bailey, would ordinarily and probably have produced death, then you would be justified in finding that the defendants intended to kill Bailey, in and by the committing of the assault and battery, with such means and instruments."

The motion was overruled.

A motion in arrest was also overruled, and exception noted, and judgment and sentence rendered, severally, upon the defendants, in accordance with the verdict.

It is assigned for error:

1. That the court overruled the motion to quash the indictment; and,
2. That the court overruled the motion for a new trial.

Counsel for the appellants declined to argue the sufficiency of the indictment, conceding that he discovers no

Hughes *et al.* v. The State.

defect in it, but proceeds to assail the verdict as insufficient in form and in certainty.

"A verdict, though informal, is good if the court can understand it; but, if it be too uncertain to be understood, it must be corrected." Bicknell Crim. Prac., p. 206. *Jones v. Julian*, 12 Ind. 274; *O'Herrin v. The State*, 14 Ind. 420; *Moon v. The State*, 3 Ind. 438; *Evans v. The State*, 7 Ind. 271.

Tested by the above rule, the verdict in the case at bar was good. It finds the defendants guilty as charged in the indictment, and affixes the punishment. These were the two matters necessary to a complete verdict against the defendants.

Counsel for appellants next urges that the verdict is not sustained by the evidence. We think it is. It is insisted that the evidence does not establish that the persons convicted bore the names given them in the indictment. The evidence is sufficient on this point. The rule as to names is not the same as to defendants as it is as to third persons named in an indictment.

The instruction, copied into the motion for a new trial, is objected to by the counsel in his brief. We have no evidence that it was ever given to the jury. It is not made a part of the record in any mode known to the law. Copying it into the motion for a new trial did not make it a part of the record, and the court may have overruled that motion because the statement in it, that that instruction was given and excepted to, was not true. *The Indianapolis, etc., Mfg. Co. v. The First National Bank, etc.*, 33 Ind. 302. See Bicknell Crim. Prac., p. 192, on the subject of exceptions, and bills of exceptions, in criminal cases.

But we see no objection to the instruction.

The judgment is affirmed, with costs.

The State, *ex rel.* Curran *et al.*, *v.* Mallory *et al.*

THE STATE, EX REL. CURRAN ET AL., *v.* MALLORY ET AL.

JUSTICE OF THE PEACE.—*May Use More Than One Docket.*—A justice of the peace may lawfully keep and use, at one and the same time, more than one "docket," of the description required by section 18, 2 R. S. 1876, p. 608, in which to record the proceedings had and judgments rendered in any or all suits before him.

From the Wayne Circuit Court.

C. H. Burchenal, T. J. Study and W. F. Medsker, for appellants.

H. C. Fox, for appellees.

Howk, C. J.—This was a suit, by the relators of the appellant, against the appellees, on the official bond of the appellee John R. Mallory, as a justice of the peace of Jackson Township, in Wayne County, Indiana. A demurrer was sustained to the original complaint, and the relators of the appellant then filed a second paragraph of complaint, which is the only paragraph in the record, and will be treated and spoken of by us as the only complaint in the case. To this complaint the appellees, except said Mallory, demurred, for the alleged insufficiency of the facts therein to constitute a cause of action, which demurrer was overruled by the court. The appellees, except said Mallory, then answered by a general denial.

The issues joined were tried by the court without a jury, and a finding made for the appellees, and judgment was rendered accordingly. The relators of the appellant then moved the court for a new trial; which motion was overruled by the court, and to this ruling they excepted and filed their bill of exceptions.

The appellant's relators have here assigned, as error, the decision of the court below in overruling their motion for a new trial. In this motion, the following causes were assigned for such new trial:

"1st. The finding of the court is contrary to law;

The State, ex rel. Curran et al., v. Mallory et al.

"2d. The finding of the court is not supported by the evidence;

"3d. For error of law occurring upon the trial, and accepted to by the plaintiff, in this, to wit:

"That the court erred in allowing the defendants to give in evidence, over plaintiffs' objections, the three several entries, and each of them, contained in the book identified by the witness, John R. Mitchell, the same being on pages 30 and 31, 32 and 33, and 36 and 37 of said book, the same being illegal and incompetent evidence."

The evidence on the trial was made part of the record of this cause, by a proper bill of exceptions. We find it necessary to a proper understanding of this case, and of our decision thereof, that we should give a summary at least of the facts established in the evidence: On the 3d day of September, 1874, the appellee John R. Mallory was duly qualified as a justice of the peace of Jackson Township, and thereafter entered upon the discharge of the duties of his office. The other appellees were his sureties, on his official bond. This suit was brought on this official bond; and the breach assigned by the appellant's relators was the alleged failure of the appellee Mallory, as such justice of the peace, to render and enter judgments in favor of said relators against one Henry A. Shroyer, upon his confession, in three different cases. On the 30th day of September, 1875, Wm. F. Medsker, Esq., an attorney at law of Cambridge City, Indiana, had in his hands, for collection, three promissory notes executed by said Shroyer to the order of said relators, two for two hundred dollars each, and the third for one hundred and ninety-five dollars, all dated September 28th, 1875, and payable one day after date. On said 30th day of September, 1875, Mr. Medsker, as such attorney, for the purpose of obtaining a confession of judgment on each of said notes, before the said Mallory as such justice, by the said Shroyer, in favor of the relators, procured from Shroyer the requisite

affidavit as to each of the notes, to the effect that he justly owed the debt evidenced thereby, and did not confess judgment therefor to defraud his creditors. Mr. Medsker, as the relators' attorney, on said last named day, filed said affidavits and notes with the appellee Mallory, as such justice, and told him to enter up judgments thereon, as soon as he possibly could, and to issue executions thereon. When the appellee Mallory entered upon the discharge of his duties, as such justice, he received a "docket" which had been used as such by his predecessor in office, which he had also used, as such justice, and which had been subsequently used by his successor in said office. This "docket" was a substantially bound volume, of 553 pages, fifteen and a half inches long and ten and a half inches wide, with the word "record" printed on its back. In this "docket" there were no judgments entered on said cognovits, in favor of said relators and against said Shroyer. When the relators' attorney, Medsker, filed the said cognovits with the justice, Mallory, and instructed him to enter up judgments thereon, the said Henry A. Shroyer was the owner of personal property, of the value of eight thousand dollars; but shortly afterward he had become wholly insolvent.

During the time the appellee John R. Mallory acted as said justice of the peace, and at the time the relators' attorney, Medsker, filed the said Shroyer's cognovits with said justice, and instructed him to enter up judgments thereon, he, the said justice, kept in his office another book, of 240 pages, substantially bound and properly indexed, which was thirteen and a half inches long and eight and a half inches wide. When the said cognovits were filed with said justice, Mallory, he rendered judgments thereon without delay, and entered the same in this last described book. In this book nineteen judgments upon confession were entered against said Henry A. Shroyer, the first dated July 29th, 1875, and the last dated Oc-

The State, ex rel. Curran et al., v. Mallory et al.

tober 30th, 1875. The judgments in favor of said relators, upon their said cognovits, were properly entered up and signed by justice Mallory, in this last mentioned book, on the 2d day of October, 1875; and on the 7th day of October, 1875, executions were issued on all of said judgments, and placed in the hands of O. N. Barnett, a constable of the proper township.

We have now given a statement of the facts of this case, as we gather the same from the record. The theory of the relators' case, as we understand it, is, that a justice of the peace, under the law of this State, can have and use but one "docket," at one and the same time, in which he must enter all judgments by him rendered; and that judgments rendered by such justice, if entered in another book kept in his office, are absolutely null and void, even though such other book may come within the statutory description of a justice's docket. In section 18 of "An act providing for the election and qualification of justices of the peace, and defining their jurisdiction, powers and duties in civil cases," approved June 9th, 1852, it is provided as follows:

"Sec. 18. Every justice shall, in a substantial bound book of not less than two hundred pages, keep a docket, in which he shall record the proceedings in full, of all suits instituted before him, which record shall contain the names of the parties at full length, a copy of the cause of action and of the set-off of the defendant, if any, and all proceedings had therein, and the amount of the judgment written out in words; and every such record of each cause, shall, when completed, be signed by such justice, and the cause noted in a proper index to be contained in such docket; and every clerk when he shall deliver to any justice his commission shall direct his attention to this section." 2 R. S. 1876, p. 608.

We are not advised of any other statutory provision, which has any direct bearing upon the case now before us.

Norris v. Tharp *et al.*

It seems to us, that the question for our decision in this case may be thus stated: Can a justice of the peace, in this State, lawfully keep and use, at one and the same time, more than one "docket," of the proper description, in which he may lawfully record the proceedings and judgments, in all or any suits before him? We think this question must be answered in the affirmative. Certainly there is nothing in the language of the section, above quoted, which prohibits a justice of the peace from keeping and using more than one "docket," at the same time, or which requires him to record the proceedings and judgments in all suits instituted before him, in one and the same book or docket. The gist of the breach assigned by the relators, in their complaint in this suit, was the failure, as alleged, of the justice, Mallory, to render and enter judgments in favor of the relators, upon said cognovits, and against the said Henry A. Shroyer. It seems to us, that the court did not err in allowing the appellees to give in evidence the entries in the book identified as a book or "docket," kept by the justice, Mallory, in his office, and used by him for the entry of the judgments confessed by said Shroyer before him as such justice. These entries showed very clearly, that the justice, Mallory, had duly rendered and entered judgments, upon said cognovits, in favor of the relators, and against the said Shroyer, and therefore that the relators had no such cause of action against the appellees, as was stated in their complaint.

In our opinion, the relators' motion for a new trial of this cause was correctly overruled.

The judgment is affirmed, at the costs of the appellant's relators.

NORRIS v. THARP ET AL.

PROMISSORY NOTE.—*Fraudulent Representations.*—*Counter-Claim.*—*Written Lease.*—*Landlord and Tenant.*—*Rescission.*—In an action by the payee.

Norris v. Tharp et al.

against the makers, a principal and surety, upon a promissory note executed in part consideration of a lease of real estate, made by the payee, to the principal, by a writing which was silent as to the character and condition of the real estate leased. the principal answered by way of counter-claim, setting out the lease, alleging the suretyship, and averring that the payee, in making such lease, had falsely and fraudulently represented to the principal that the real estate was so underdrained as to be fit for farming equally well in wet and dry seasons; that he had no means of ascertaining whether or not such representations were true, and, relying upon them, accepted the lease and executed the note; and that such representations were false, that a part of the lease was during a wet season, and that for want of underdraining his crops had failed.

Held, on demurrer, that the answer is sufficient as a counter-claim.

From the Miami Circuit Court.

R. P. Effinger, L. Walker and C. A. Cole, for appellant.
J. L. Farrar and J. Farrar, for appellees.

PERKINS, J.—Orville M. Tharp sued William D. and Samuel Norris upon a promissory note, of which the following is a copy :

“ \$360.

August 1st, 1873.

“ Three years after date, we promise to pay to the order of O. M. Tharp three hundred and sixty dollars, with interest at ten per cent. per annum, value received, after maturity, without any relief whatever from valuation or appraisement laws. If this note be collected by suit, the judgment shall include a reasonable fee for plaintiff's attorney, and shall bear ten per cent. interest after maturity.

“ WILLIAM D. NORRIS,

“ SAM'L NORRIS.”

William D. Norris answered, that the note sued on is one of the notes mentioned in the following contract, viz. :

“Article of agreement made and entered into between Orville M. Tharp, of Miami county and State of Indiana, of the first part, and William D. Norris and Samuel Norris, of Wabash county and State of Indiana, of the second part, and provides as follows, viz. :” [Here follows a lease for

Norris v. Tharp et al.

three years, of a farm, containing specifications as to crops and manner of cultivation, but containing no statements as to the character or condition of the land ; the lease concluding with the statement that the lessee agrees to pay the sum of \$360 per annum, for which he and his surety executed their notes to said Tharp.] The lease is signed by—

“ ORVILLE M. THARP,

“ WILLIAM D. NORRIS,

“ SAMUEL NORRIS.”

Samuel Norris was surety for William D. Norris, but died after the commencement of this suit.

Said William D. Norris further averred, that said note “ was given for the rental of the said real estate, and for no other or different consideration ; that the other two of said notes have been fully paid by this defendant ; and he further alleges, that, at and previous to the time of the execution of said lease and notes, and as an inducement to their execution, and to the entering into said contract by this defendant, the plaintiff represented to him that the said land, which he proposed to lease to this defendant, was thoroughly underdrained and suitable for tillage, both in wet and dry seasons ; that this defendant, knowing nothing of the facts in that regard, and having no means prior to the execution of said contract of ascertaining the same except from the statements of said plaintiff as aforesaid, and relying upon the representations so made, was induced to enter into said contract and execute said notes, whereby he agreed to pay the full value and price for the use of land underdrained and suitable for tillage, as aforesaid. And the defendant avers, that the representations so made by said plaintiff to him as aforesaid were false and fraudulent ; that said land was not underdrained and suitable for tillage as aforesaid, but was without underdrainage, and unsuited for tillage in wet seasons ; that, during the time the same was occupied by this defendant under the said

Norris v. Tharp et al.

lease, particularly during the last two years, the same was so wet and heavy by reason of the lack of underdrainage, as to be unfit for tillage, and unsuitable for the raising of any crops thereon; that, during the years 1875 and 1876, the period of said occupancy for which the note sued on in this action was given, the said land, for the reasons aforesaid, for the lack of such underdrainage, was unfit for cultivation, and unsuited for raising crops. Wherefore this answer is made a counter-claim, and he prays judgment for relief," etc. He avers that Samuel Norris was surety only in the agreement.

A demurrer, for the want of facts, was sustained to the paragraph; the defendant excepted, and refused to answer over. Thereupon the court rendered judgment for the plaintiff.

The defendant appealed, and assigns for errors:

1. The court erred in sustaining the demurrer to the paragraph of answer or cross complaint;
2. The court erred in including an attorney's fee in the judgment.

It may be remarked here that no objection or exception was made or taken to the judgment below. However, there is nothing in the second assignment of error. *Thompson v. Davis*, 29 Ind. 264.

We think the first error is well assigned. *Beaver v. The President, etc.*, 34 Ind. 245; *Hinkle v. Margerum*, 50 Ind. 240; *Strong v. Downing*, 34 Ind. 300.

The representations averred in the answer to have been made by Tharp to Norris, as inducements to the latter to take the lease of the farm and execute the note sued upon, were of material matters, largely affecting the value of the lease. And it is averred in the answer, that those representations were false and fraudulent; that they were relied upon as true by the defendant, appellant here, and that damage was occasioned, etc. And we think the circum-

Fisher v. The State, *ex rel.* Wildermuth.

stances under which they were made were such as to justify the party to whom they were made in relying upon said representations.

Such being the case, the party defrauded had a right to bring an action for damages, while, had he so elected at the proper time; he might have sought a rescission of the contract.

In *Shaeffer v. Sleade*, 7 Blackf. 178, SULLIVAN, J., in delivering the opinion of the court, said:

“At law, an action may be maintained for false representations, made by a vendor to a purchaser, of matters within the peculiar knowledge of the vendor, whereby the purchaser is injured.”

Harvey v. Smith, 17 Ind. 272, was an action for damages occasioned by false and fraudulent representations in the sale of property, and the action was sustained.

The appellant, then, having a right to maintain an action for damages for the fraud, might recover such damages, upon a counter-claim, in the action by the fraudulent lessor to recover the price agreed to be paid upon the lease.

The court erred in sustaining the demurrer to the answer. It was judicious that the counter-claim should be filed in the suit upon the last note, as the damages at that time could be determined with more accuracy.

The judgment is reversed, with costs; cause remanded for further proceedings in accordance with this opinion.

FISHER v. THE STATE, EX REL. WILDERMUTH.

BASTARDY.—*Admission of Maintenance Provided for Child.*—The admission of the mother of a bastard child, that provision for the maintenance of her child has been made to her satisfaction, as contemplated by section 17 of the bastardy act, 2 R. S. 1876, p. 660, must be entered of record.

SAME.—An admission, in writing, that such provision has been made, which

Fisher v. The State, *ex rel.* Wildermuth.

has not been entered of record, though containing a request that it be so entered, is no bar to a subsequent prosecution.

SAME.—*Arrest of Judgment.*—*Venue.*—*Amendment.*—The omission of the venue from the affidavit instituting a prosecution for bastardy is not ground for arresting the judgment, and is deemed, by the Supreme Court, as having been supplied by amendment in the court below.

SAME.—*Motion to Dismiss Action.*—*Exception.*—*Supreme Court.*—Error in overruling a motion to dismiss such a prosecution, if not excepted to at the time, is not available in the Supreme Court.

SAME.—*New Trial.*—*Bill of Exceptions.*—The truth of causes alleged in a motion for a new trial must be shown by a bill of exceptions.

SAME.—*Assignment of Error.*—A mere cause for a new trial can not properly be assigned as error, in the Supreme Court.

From the Pulaski Circuit Court.

D. P. Baldwin and *D. D. Dykeman*, for appellant.

T. S. Rollins, for appellee.

Howe, C. J.—In this case, Loretta Wildermuth filed, before a justice of the peace of Pulaski county, her verified complaint, wherein she alleged that she was pregnant with a bastard child, of which the appellant, Martin Fisher, was the father.

Upon a hearing before the justice, it was adjudged that the appellant was the father of the relatrix's bastard child.

In the court below, the appellant's motion to dismiss the cause, for the want of a "proper affidavit," was overruled.

The appellant then answered in two paragraphs:

1. A general denial; and,
2. An affirmative answer, which we will hereafter notice.

The appellee demurred to the second paragraph of the appellant's answer, which demurrer was sustained by the court, and to this decision the appellant excepted.

The cause was tried by a jury, and a verdict was returned for the appellee, that the appellant was the father of the bastard child mentioned in the complaint.

The appellant's motion for a new trial was overruled by the court, and to this ruling he excepted. His motion in arrest of judgment was also overruled by the court,

Fisher v. The State, *ex rel.* Wildermuth.

and he excepted to this decision; and judgment was rendered upon and in accordance with the verdict of the jury.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling his motion to dismiss this suit;
2. In sustaining a demurrer to the second paragraph of his answer;
3. In sustaining a demurrer to said second paragraph, as amended;
4. In overruling his motion for a new trial;
5. In overruling his motion in arrest of judgment; and,
6. Error of the court, in the exclusion of certain evidence.

1. The record fails to show that the appellant, at the time, excepted to the decision of the court in overruling his motion to dismiss this suit. Without such an exception, the alleged error of the court, in overruling said motion, was not properly saved in the record, and presents no question for our decision. This rule of practice is founded on the provisions of the code, and has been so long and so often recognized and acted upon, in the decisions of this court, that we need not cite authorities in its support.

2. The second and third errors assigned by the appellant relate to the sufficiency of the second paragraph of his answer, and may well be considered together, as they present substantially the same question for our decision. In the second paragraph of his answer, the appellant set up a written certificate of satisfaction, executed by the appellee's relatrix, as follows:

"December 21st, 1875. I hereby certify, that full satisfaction has been made by Martin Fisher for the support of my bastard child; as a fact of the same, I, therefore, wish the same dismissed.

[Signed,]

"M. LORETTA WILDERMUTH."

Fisher v. The State, *ex rel.* Wildermuth.

It was alleged in said paragraph of answer, that the appellant had given bond, with security, to the appellee's relatrix, then an adult, for the payment to her, in instalments, of the sum of fifty dollars, which sum she had agreed to receive in full satisfaction for the support of her bastard child; that he had tendered the said sum of fifty dollars, as the instalments became due, to the relatrix, and to her father and mother, and that he had been and still was ready to comply with said agreement in every way; and that he brought into court the agreement of the relatrix for the dismissal of this suit, and asked that the same might be entered of record, in the court below, as the acknowledgment of the relatrix, that provision to her satisfaction had been made for her bastard child, and that the same might still stand as her agreement in said court.

It is very clear, we think, that the facts stated in this second paragraph of answer were not sufficient to constitute a valid defence to this action. In section 17 of "An act regulating prosecutions in cases of bastardy," etc., approved May 6th, 1852, it is provided, that "The prosecuting witness, if an adult, may, at any time before final judgment, dismiss such suit, if she will first enter of record an admission that provision for the maintenance of the child has been made to her satisfaction, * * * and such entry * * * shall be a bar to all other prosecutions for the same cause and purpose." 2 R. S. 1876, p. 660. Under this provision of the statute, it is essentially requisite that the prosecuting witness should "enter of record an admission that provision for the maintenance of the child has been made to her satisfaction." The case at bar is very similar to the case of *Harness v. The State, ex rel.*, 57 Ind. 1, in which it was held by this court, that an acknowledgment of satisfaction by the prosecuting witness, of provision made for the support of her bastard child, not entered of

Fisher v. The State, *ex rel.* Wildermuth.

record as provided by the statute, would not bar a further prosecution. The court did not err in sustaining the demurrer to this second paragraph of answer, either as originally filed or as amended.

4. The fourth error complained of by the appellant is the decision of the circuit court in overruling his motion for a new trial. In this motion, a large number of causes for such new trial were assigned, consisting chiefly of alleged errors of law, occurring at the trial, and excepted to by the appellant. There is no bill of exceptions in the record, and therefore the truth of these causes for a new trial is not made manifest, in the mode prescribed by law.

We can not say, from the record of this cause, that the court erred in overruling the appellant's motion for a new trial, and therefore we are bound to say that the court committed no error in this ruling; for all the presumptions are in favor of the correctness of the court's decision. *Myers v. Murphy*, 60 Ind. 282.

5. The fifth alleged error, the overruling of the appellant's motion in arrest of judgment, calls in question only the sufficiency of the complaint of the relatrix, after trial and verdict. The objection to the complaint is, that it had no venue. This objection is to the form, rather than to the substance of the complaint; and it can not be made available, on a motion in arrest of judgment. Besides, this is a civil action, and the complaint might have been amended, so as to obviate this objection, in the circuit court, and it will be regarded as thus amended, in this court. The complaint certainly informed the appellant of the nature of the relatrix's cause of action, and was so explicit that a judgment thereon could be used as a bar to another suit for the same cause. As a rule, this is all that is requisite in a complaint in a suit originating, as this did, before a justice of the peace. *Hewett v. Jenkins*, 60 Ind. 110.

Galvin v. Crouch.

We are clearly of the opinion, that the complaint in this case was sufficient after verdict, on a motion in arrest of judgment; and that the motion was correctly overruled. *Dibble v. The State, ex rel.*, 48 Ind. 470.

6. The sixth and last error assigned was merely a cause for a new trial, and presents no question for our decision. A cause for a new trial can not be assigned as error, in this court. *Freeze v. DePuy*, 57 Ind. 188; *Walls v. The Anderson, etc., R. R. Co.*, 60 Ind. 56.

We find no available error in the record of this cause.

The judgment is affirmed, at the appellant's costs.

GALVIN v. CROUCH.

SEDUCTION.—*Complaint.*—In an action under section 24 of the code, 2 R. S. 1876, p. 43, for seduction, the complaint must allege that the plaintiff is an "unmarried female."

SAME.—*Common Law.*—Such action did not exist at common law.

From the Boone Circuit Court.

C. S. Wesner and C. C. Galvin, for appellant.

BIDDLE, J.—Complaint for seduction in the following words:

"Martha J. Crouch, by her next friend, Jonathan G. Crouch, complains of Christopher C. Galvin, and says: That, on the 15th day of April, 1874, at and while the plaintiff was employed as a servant in the family of the defendant, the defendant, at the county of Boone and State of Indiana, did seduce and have carnal knowledge of the plaintiff, who was then and there a person under the age of twenty-one years; and that said plaintiff had always been chaste and virtuous, and born a good character for virtue and chastity until said defendant, at the

Galvin v. Crouch.

time aforesaid, seduced and carnally knew her; and that said defendant did have carnal knowledge of said plaintiff continuously from the 15th day of April, 1874, until the 13th day of June, 1874; and, by reason of said seduction and carnal knowledge that defendant had with plaintiff, she became sick with child, and so remained and continued for the space of nine months from the 13th day of June, 1874, at the expiration of which time, on the 13th day of March, 1875, she was delivered of a male bastard child, of which she was pregnant as aforesaid; that, in consequence of said seduction and carnal knowledge of plaintiff by the defendant, the plaintiff has suffered greatly in her health, and become sick, and so continued for the space of ten months, during all which time she suffered great pain, and was prevented from transacting her necessary business and affairs, and has been greatly injured and disturbed in her peace of mind, and has been otherwise greatly injured, to her damage in the sum of ten thousand dollars. Wherefore," etc.

A demurrer, alleging the want of sufficient facts, was overruled to the complaint. Answer; trial by jury; verdict for appellee. The appellant, by the proper exceptions and appeal, has presented to us the sufficiency of the complaint, and the sufficiency of the evidence to maintain the action, as questions for our decision.

The objection made to the complaint is, that it does not aver the plaintiff to be an "unmarried female." This objection is well taken. At common law the appellee would have had no right of action on the facts stated in the complaint. By our code it is enacted:

"Sec. 24. Any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor."

In asserting a right which did not exist at common law, but is wholly created by statute, the statute must be

Buck v. Steffey.

strictly complied with. The case of *Thompson v. Young*, 51 Ind. 599, is in point.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

BUCK v. STEFFEY.

MISTAKE.—Promissory Note.—Burden of Proof.—The burden of proof of an alleged mistake in a promissory note in suit is upon the party alleging the mistake; and it must be shown to have been mutual.

SUPREME COURT.—Weight of Evidence.—The Supreme Court will not disturb a finding upon the mere weight of evidence.

From the Knox Circuit Court.

T. R. Cobb and *O. H. Cobb*, for appellant.

W. F. Pidgeon, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellant, upon a promissory note, of which the following is a copy:

“\$1,479.75.

March 21st, 1874.

“On or before the 1st day of March, 1876, I promise to pay to the order of George W. Steffey fourteen hundred and seventy-nine and seventy-five one-hundredths dollars, value received, without any relief from valuation or appraisement laws, with ten per cent. interest from the 1st day of March, 1874, until paid.”

(Signed,)

his
“LEANDER + BUCK.
mark.

“Teste: A. DUNN.”

It was alleged in appellee's complaint, that the note, less certain specified credits, was due and unpaid; and judgment was demanded for two thousand dollars.

Buck v. Steffey.

The appellant answered in three paragraphs, in substance, as follows:

1. A general denial;
2. Payment; and,
3. By way of cross-complaint, the appellant said, that, on the 21st day of March, 1874, he entered into a contract with the appellee, whereby, among other things, he agreed to execute to the appellee a note for one thousand four hundred and seventy-nine dollars and seventy-five cents, payable on the 1st day of March, 1876, without relief, etc., and bearing interest at the rate of ten per cent. per annum from the 1st day of March, 1875; that the note in suit was drafted, and by mistake of the draftsman was made, to bear interest from March 1st, 1874, instead of March 1st, 1875; and that the appellant, by mistake, signed said note, believing that it contained these words, "with ten per cent. interest from the 1st day of March, 1875," instead of "from the 1st day of March, 1874," as the note in suit then read. Wherefore the appellant asked, that the said mistake in said note might be corrected.

The appellee replied by general denial, to the second and third paragraphs of said answer.

The issues joined were tried by the court, and a finding was made for the appellee. The appellant's motion for a new trial was overruled, and his exception was entered to this ruling, and the court rendered judgment on its finding.

The overruling of his motion for a new trial is the only error assigned by the appellant in this court; and the only question thereby presented for our decision is, whether or not, upon the weight of the evidence, there was a mistake in the note in suit, which the appellant was entitled to have corrected. Before the appellant could have the alleged mistake corrected and obtain a reformation of the note in suit, as the burthen of this issue was on him, it

Monroe v. The Adams Express Company.

was necessary that he should show, by a fair preponderance of the evidence, that the alleged mistake existed, and that it was the mutual mistake of the appellee as well as of himself. It was not enough for the appellant to show, as alleged in his cross complaint, that he, by mistake, executed the note as it was drafted; but he should have shown that the mistake in the note was the mutual mistake of both the parties thereto. *Baldwin v. Kerlin*, 46 Ind. 426; *Barnes v. Bartlett*, 47 Ind. 98; *Heavenridge v. Mondy*, 49 Ind. 434.

In this case, the appellant testified that there was such a mistake in the note, as he had alleged in his cross complaint; while, on the contrary, the appellee testified that the note was right, and the attesting witness, who drafted the note, testified that he wrote the note as the appellant directed. It would seem that the preponderance of the evidence fairly sustained the finding; but, whether it did or not, there was certainly evidence introduced which tended to sustain the finding of the court, and that is all that is required in this court. We have so often decided, in such cases, that we would not disturb the finding or verdict upon the mere weight of the evidence, that we may be excused, we trust, from citing authorities to that effect.

Our reports are full of such decisions.

The judgment is affirmed, at the appellant's costs, with three per centum damages.

MONROE v. THE ADAMS EXPRESS COMPANY.

EXPRESS COMPANY.—*Action for Failure to Deliver Money.*—*Answers to Interrogatories.*—*Judgment Non Obstante.*—*Principal and Agent.*—In an action against an express company, to recover for money entrusted to it

Monroe v. The Adams Express Company.

by the plaintiff for delivery to another, and alleged to have been lost, the jury, with their general verdict for the plaintiff, found specially, in answer to interrogatories, that the money had been received from the plaintiff, by the agent of the company, for delivery to the consignee, and that the package containing it had been delivered by another agent, with the seals unbroken, to one not the consignee.

Held, the evidence not being in the record, that the answers are not inconsistent with the general verdict.

SAME.—Motion.—Exception.—Record.—A motion for a judgment *non obstante*, and an exception to the ruling thereon, are parts of the record.

From the Ohio Circuit Court.

A. C. Downey, H. S. Downey and J. S. Jelley, for appellant.

E. C. Devore, for appellee.

PERKINS, J.—Suit by the appellant, against the appellee, to recover the value of a package of money alleged to have been lost by the latter.

Answer, general denial.

Trial by jury; verdict for the appellant, accompanied by answers to interrogatories, as follows:

“The plaintiff asks and requests the court to propound the following interrogatories to be answered by the jury:

“1. Did Miss Monroe write a letter and direct the same W. H. Thayer & Co., on or about the 25th of July, 1877, inclosing in the envelope one hundred dollars, and deliver the same to Dalrymple, to be shipped to Cincinnati?

“Ans. Yes.

“2. Did Dalrymple receive the one hundred dollars from Miss Monroe after she had taken it to his office, and did Miss Monroe leave the one hundred dollars with him?

“Ans. Yes.

“3. At the time Miss Monroe took and delivered the one hundred dollars to Dalrymple, was he then the authorized agent of the defendant?

“Ans. Yes.

“4. Did Dalrymple seal up with wax the envelope, in

Monroe v. The Adams Express Company.

the presence of Miss Monroe, after she had placed the one hundred dollars in the envelope?

"Ans. Yes.

"5. Had the Express Company notice of the loss of the said one hundred dollars, within thirty days after the same was given to their agent, Dalrymple, at Rising Sun, Indiana, on the 25th of July, 1877?

"Ans. Yes.

"6. Did Dalrymple, the agent of the Express Company, at the request of Miss Monroe, notify the Company of the loss of the package, within thirty days after it was delivered to their agent?

"Ans. Yes. SOLOMON R. KITTEE, Foreman."

"Comes the defendant and requests the court to propound to the jury, on behalf of the defendant, the following interrogatories, to be answered by them in case they find a general verdict:

"1. Was the one hundred dollars, for which this suit is brought, in the envelope when it was delivered to Joseph Dalrymple, the agent of defendant at Rising Sun, Ind., on the 25th day of July, 1877?

"Ans. Yes.

"2. Was it sealed up with wax by Joseph Dalrymple, and the seal of the Rising Sun office impressed upon the wax by said Joseph Dalrymple?

"Ans. Yes.

"3. Were whatever contents that was in the envelope when delivered by plaintiff to defendant's agent, Dalrymple, and sealed up by him, delivered to defendant's messenger, W. L. Dickson?

"Ans. Yes.

"4. Were the seals and envelope in good order when delivered to the messenger, W. L. Dixon, by Dalrymple?

"Ans. Yes.

"5. Were the seals and envelope in good order and

Monroe v. The Adams Express Company.

intact when delivery was made to the money clerk, J. A. G. Roberts?

"Ans. Yes.

"6. Were the seals and envelope intact and in good order when it was delivered by the money delivery clerk, Jesse L. Little?

"Ans. Yes.

"7. Were the seals and envelope in good order and intact when it was delivered to Thomas P. Felter?

"Ans. Yes.

"8. If the one hundred dollars was in the envelope when delivered, and sealed with wax by the agent, Dalrymple, who took it out?

"Ans. The evidence does not disclose.

"9. If the one hundred dollars was in the envelope when delivered to, and sealed up by, the agent, Dalrymple, where was it taken out?

"Ans. The evidence does not disclose.

"10. Did the plaintiff, Martha Monroe, make claim in writing, of the defendant, for the loss of said one hundred dollars, at their office in Rising Sun, Ind., within thirty days from the 25th day of July, 1877?

"Ans. Yes.

"11. Did the plaintiff, Martha Monroe, make a claim in writing, of any officer or agent of the defendant for the loss of said one hundred dollars, within thirty days from the 25th day of July, 1877, to which the original receipt was attached?

"Ans. Yes, except the attachment of company's receipt. SOLOMON R. KITTLE, Foreman."

The appellee interposed the following motion, viz.: "That the court render judgment in their favor, notwithstanding the general verdict, upon the answers to interrogatories, because said answers are inconsistent with the general verdict."

Monroe v. The Adams Express Company.

The appellant moved orally for judgment on the general verdict.

The court sustained the former motion, and overruled the latter. Exceptions were entered.

The answers to interrogatories were not inconsistent with the general verdict.

The general verdict implied a finding by the jury of these facts, viz., that the appellee had received the appellant's money, upon an agreement to deliver it to W. H. Thayer & Co., at Cincinnati, Ohio, and that appellee had not delivered it pursuant to the agreement, but should have done so.

The answers to interrogatories affirm the facts, that the appellee had received the money of appellant, to be delivered to said Thayer & Co., for the appellant, but fail to show that it had been so delivered, or any excuse for the failure to make such delivery.

Those answers enabled the jury to follow the money to the hands of Thomas P. Felter, but they fail to disclose any connection between him and W. H. Thayer & Co., and the evidence is not in the record.

The general verdict shows, that the appellees were liable to pay the money to the appellant, and the answers to interrogatories show nothing to the contrary. The two are not inconsistent, but are consistent, but the latter rather affirmatively support the former.

Such being the case, the court should have rendered judgment on the general verdict for the plaintiff.

Judgment goes, of course, on the general verdict, in the absence of any valid objection thereto.

It is said in *Delawter v. The Sand Creek, etc., Co.*, 26 Ind. 407: "The party asking that a special finding shall control a general one, must see to it that his finding is sufficient."

Answers to interrogatories and special findings are a part of the record, and, where a motion is made for judg-

The Singer Manufacturing Company v. Doxey.

ment on such findings or answers, it becomes a part of the record, and so does an entry of exception to a ruling thereon.

The court erred in failing to render judgment on the general verdict.

Reversed, with costs, and cause remanded, with instructions to render judgment on the general verdict.

THE SINGER MANUFACTURING COMPANY v. DOXEY.

REPLEVIN.—*Justice of Peace.*—*Assessment of Value Exceeding that Alleged.*—*Verdict.*—*New Trial.*—*Amendment of Complaint.*—*Supreme Court.*—On trial in the circuit court, on appeal by the plaintiff, of an action commenced before a justice of the peace to recover the possession of a chattel alleged in the complaint to be of the value of twenty-five dollars, the jury returned a verdict that the plaintiff was the owner and entitled to the possession of the chattel, that it was of the value of sixty-five dollars, and that it was unlawfully detained by the defendant.

Held, that, if the property be adjudged to the plaintiff, and is not returned or can not be found, he is entitled to judgment for the value thereof, whether demanded by the complaint or not.

Held, also, that the fact that the value assessed by the verdict exceeds that alleged in the complaint is not cause for a new trial.

Held, also, that the Supreme Court will deem the complaint to have been so amended as to correspond with the verdict.

From the Vigo Circuit Court.

T. H. Harper and *J. G. Williams*, for appellant.

Howk, C. J.—This was a suit by the appellee, against the appellant, commenced before a justice of the peace of Vigo county, to recover the possession of a certain sewing machine.

In her complaint, the appellee alleged, in substance, that she was the owner, and entitled to the possession, of a certain sewing machine, No. 639,368, of the value of twenty-five dollars, of which the appellant had

The Singer Manufacturing Company v. Dozey.

possession without right, and which was unlawfully detained from the appellee by the appellant; and that the said machine had not been taken by virtue of any execution or other writ against the appellee. Wherefore she demanded judgment for the recovery of said property, and five dollars for its detention, and other proper relief.

This complaint was duly verified by the appellee's oath; and her bond with sureties having been filed with and approved by the justice, a writ of replevin was duly issued to the proper constable, by virtue of which he seized the said sewing machine and delivered it to the appellee.

On the day set for the trial of the cause before the justice, the appellant appeared, and the appellee was called and made default, and judgment was rendered accordingly, in favor of the appellant and against the appellee, for the return of the property, and for the recovery of the costs of suit. From this judgment there was an appeal by the appellee to the court below.

In this latter court, the cause was tried by a jury, and a verdict was returned for the appellee, to the effect that she was the owner, and lawfully entitled to the possession, of the sewing machine; that it was of the value of sixty-five dollars, and that it was unlawfully detained from her by the appellant, and assessing her damages for the detention thereof in the sum of one cent.

The appellant's motion for a new trial having been overruled, and its exception saved to this ruling, judgment was rendered on the verdict, from which judgment this appeal is now here prosecuted.

The only alleged error, assigned by the appellant, is the decision of the court below in overruling its motion for a new trial. The causes for such new trial were as follows:

"1. Because the verdict of the jury is not sustained by the evidence;

"2. Because the verdict of the jury is contrary to the evidence; and,

"3. Because the jury erred in the assessment of the value of the property detained, the assessment being greater than the value stated in the complaint."

Upon the third cause assigned for such new trial, the appellant's counsel chiefly rely, in this court, for a reversal of the judgment of the circuit court. In her complaint, verified by her oath, the appellee alleged that the value of the sewing machine sued for was twenty-five dollars. On the trial, as a witness in her own behalf, she testified that the value of said machine was sixty-five dollars, or forty dollars more than the value alleged in the complaint. In their verdict, the jury found and assessed the value of said machine at the sum of sixty-five dollars; and, in the alternative judgment authorized by the statute in such cases, it was considered by the court, that the appellee recover of the appellant the said sewing machine, and that the appellant deliver the machine to the appellee, "or, in case a delivery thereof can not be had," that the appellee recover of the appellant the said sum of sixty-five dollars, etc.

Did the jury err in assessing the value of the sewing machine at a sum in excess of the value thereof alleged by the appellee in her complaint? This is the question, and the only question, presented by the appellant's counsel for our decision, in the case now before us. We are asked to reverse the judgment of the court below, not because the appellant was in fact the owner of the sewing machine in controversy, nor because the appellee was not the lawful owner, and lawfully entitled to the possession, of said machine, but purely and simply for the reason that the jury had assessed the value of the appellee's machine at forty dollars in excess of the value placed upon it by the appellee, in her complaint. The appellee was entitled to the possession of the machine, and this fact is not controverted

The Singer Manufacturing Company v. Doxey.

by the appellant in this court; the appellant was not entitled to the possession of the machine, and this fact is virtually admitted by the appellant, in this court. Under these facts, admitted or at least not controverted in this court, what possible difference could it make to the appellant, that the jury had assessed the machine at a value in excess of the value placed upon it by the appellee, in her complaint? We fail to see how this increased valuation could, in any manner or by any possibility, injuriously affect the appellant, except upon the hypothesis, which it would be unjust to attribute to the appellant, that it desired to appropriate to its own use the appellee's machine, by the payment therefor of but little more than one-third of its actual value.

It does not clearly appear, from the record of this cause, which one of the parties to this action had possession of the sewing machine, at the time of the trial and judgment therein, in the circuit court. From the form of the judgment, however, we think it may be fairly assumed, that the machine was then in the possession of the appellant; for the judgment was, that the appellant should deliver the machine to the appellee. If, under the judgment, the machine was delivered to the appellee, of course the appellant could not be affected by, and would have no possible interest in, the value of the machine as assessed by the jury. If the machine should not be delivered to the appellee, in accordance with the judgment, the reason for such non-delivery, we may fairly assume, would be that the machine could not be found. In that event, it seems to us, that the case would come within the purview and meaning of section 74 of the justices' act in civil cases, approved June 9th, 1852, wherein it is provided, that, if the "property, not so found, is adjudged to be the property of the plaintiff, and liable to have been recovered in that action, if it had been found, he shall recover the value thereof in damages, whether he shall have claimed that

The Singer Manufacturing Company v. Doxey.

amount as damages in his complaint or not." 2 R. S. 1876, p. 630.

We think the case at bar comes fairly within the spirit, scope and purpose of this statutory provision; that the sewing machine is adjudged to be the property of the appellee, and is recovered by her, and the appellant is required to deliver the same to her, in this action; and that, if the appellant should not deliver the machine to her, and if it is not found, then the appellee might, under the statute, recover the value of the machine in damages, whether she had demanded judgment for that amount in her complaint or not.

We do not think, that, in an action to recover the possession of personal property, the value placed upon the property by the plaintiff in his complaint is or ought to be regarded as a limitation upon the amount of the plaintiff's recovery, if the property can not be found, or if, from any other cause, having obtained a judgment for its recovery, he should fail to get possession thereof. But if it were otherwise, if such value were an absolute limitation upon the amount of the plaintiff's recovery, then the complaint might have been so amended, on trial in the court below, as to make the averment of the value of the property correspond with the proof of its value; and therefore, in this court, it will be deemed and taken to have been thus amended. *Lucas v. Smith*, 42 Ind. 103; *Hamilton v. Winterrowd*, 43 Ind. 393; *Krewson v. Cloud*, 45 Ind. 273.

In any view of this case, therefore, it seems very clear to us, that no error was committed by the circuit court, in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

Binford, Administrator, v. Willson.

BINFORD, ADMINISTRATOR, v. WILLSON.

PROMISSORY NOTES SECURED BY MORTGAGE.—*Foreclosure of All on Maturity of Part.—Complaint Against Endorser.—Negligence.—Execution.—Excess on Execution must be Paid to Judgment Debtor.*—The payee of several promissory notes maturing successively and secured by a mortgage on real estate endorsed them to one who, on maturity of part, foreclosed the mortgage, obtaining a finding and decree showing the amounts due and to become due, and the dates of maturity, and ordering the real estate to be sold without division, etc. He then exhausted the mortgaged premises, and all other property of the mortgagor, by execution, without satisfying the instalment already due, and, upon the maturity of the other instalments, he brought suit against the payee, as endorser, alleging the foregoing facts and also "the utter insolvency of the maker of the notes, at, before and after the maturity of" each instalment.

Held, on demurrer, that the complaint is sufficient without an averment of a return of *nulla bona*.

Held, also, that negligence in the collection of the amount found *due* on foreclosure is no defence to the action against the endorser for the instalments afterward maturing.

Held, also, that execution could not issue for the instalments not matured until they became due.

Held, also, that any money made on execution in excess of the instalments due must be paid to the judgment debtor, and can not be applied on instalments not matured.

From the Montgomery Circuit Court.

L. C. Thomas, P. S. Kennedy and W. T. Brush, for appellant.

S. C. Willson and L. B. Willson, for appellee.

PERKINS, J.—Suit against Samuel C. Willson as assignor of promissory notes.

The facts are these:

On the 10th day of March, 1870, Cornelius Blair executed to Samuel C. Willson ten promissory notes, payable one each year till all were paid, and, at the same time, executed a mortgage on certain real estate to secure their payment. Willson assigned the notes and delivered the mortgage to one Whitlock, since deceased, on whose estate appellant, Binford, is administrator. The fourth in the

Binford, Administrator, v. Willson.

series of notes became due March 10th, 1874. On the 15th of April following, no one of the notes due having been paid, suit was commenced on said four notes and for the foreclosure of the mortgage. Judgment of foreclosure was obtained for the sum of sixteen hundred and twenty-two dollars and eighty cents, the amount of the four notes then due, with a further finding of the amount that would become due on each of the remaining six notes, and the time of its becoming due; the first on the 10th of March, 1875, and one of the others in each successive year till 1880. The land mortgaged not being susceptible of division was ordered to be sold and the proceeds applied to the payment of the sum found due on the first four notes, and the residue, if any, to the payment of the amounts thereafter to become due on the remaining six notes. "And it was adjudged, that, if the mortgaged premises should not sell for sufficient to pay the amount due, the residue should be levied of the property of said Blair."

The mortgaged property was sold on the decree of foreclosure, and brought but fifteen hundred dollars, being less, by one hundred and twenty-two dollars and eighty cents, than the amount due on the first four notes, and for this balance a levy was made upon other property of said Blair, by means of which levy the sum of one hundred and six dollars and fifteen cents, in addition to the fifteen hundred dollars realized by the sale of the mortgaged property, was obtained. But this left still a balance unpaid of the amount due on the first four notes. To recover this balance a suit was instituted against Willson, the assignor of the notes. Willson resisted a recovery against him in that suit, on the ground that the assignee had not used due diligence against Blair, the maker of the notes, and resisted successfully. *Willson v. Binford*, 54 Ind. 569.

On the 10th of March, 1877, three more of the notes of Blair, assigned by Willson to Whitlock, had become due

Binford, Administrator, v. Willson.

and were not paid, and on the 9th of April, 1877, a suit against Willson, the assignor, was commenced for the recovery of the amount due on said notes. The complaint did not aver that execution had been issued and returned "no property found" on the amounts, severally, which it was found in the decree of foreclosure would become due at stated periods (see 2 R. S. 1876, pp. 263, 264, secs. 635, 636, 637 and 639; *Skelton v. Ward*, 51 Ind. 46); but it did aver the utter insolvency of the maker of the notes at, before and after such stated periods or times, as an excuse for not causing such issues of execution, etc. This was sufficient. *Reynolds v. Jones*, 19 Ind. 123; *Roberts v. Masters*, 40 Ind. 461; *Markel v. Evans*, 47 Ind. 326.

But the appellee, Willson, claims, that the negligence of the assignee in regard to the balance due on the first four notes, above shown, discharged him from liability as assignor upon the six notes which had not, at the time of such negligence, become due, so that they could be collected by execution.

On this point he is clearly in error. That negligence only discharged him from liability as assignor upon the notes then due, and the collection of which that negligence might affect. But that negligence could not affect the collection of the notes not then due. Execution could not issue on the amounts severally named in the decree to become due on such notes, till those amounts actually became due. Nor could any balance that might be collected on execution on the notes due, beyond paying the amounts due thereon, be applied to the payment of the sums named in the decree to become due, but such balance the sheriff would be bound to pay to the defendant in the execution, the maker of the notes. *Skelton v. Ward*, *supra*; *Thompson v. Davis*, 29 Ind. 264. Hence no legal diligence of the assignee, in the ordinary prosecution of suit, could have secured the payment of the notes or instalments in the

The Fort Wayne, Jackson and Saginaw R. R. Co. v. Husselman.

decree, before they became due. And the negligence as to those due could not, in a legal sense, injure the assignor of those not due. The fact that a man owes debts due at a future time does not disable him to use and lose property he may possess in the time prior to the debts becoming due. *Cook v. Tullis*, 18 Wal. 332.

The mortgage security had been exhausted in paying the first four of the notes. Hence the remaining six stood, as to the point in question, like so many personal obligations due one each successive year. As to such notes it is plain that negligence in the collection of any one would not release from liability on any other as to which diligence might be used, or legally excused.

The judgment is reversed, with costs, and cause remanded, with instructions to overrule the demurrer to the complaint.

Petition for a rehearing overruled.

THE FORT WAYNE, JACKSON AND SAGINAW R. R. Co. v.
HUSSELMAN.

SUPREME COURT.—*Weight of Evidence.*—*Case Criticised.*—The Supreme Court will not disturb a verdict on the mere weight of the evidence. *The Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185, criticised.

From the DeKalb Circuit Court.

J. I. Best, *C. A. O. McClellan*, *J. M. Coombs*, *J. Morris* and *R. C. Bell*, for appellant.

L. J. Blair, for appellee.

Howk, C. J.—This was an action by the appellant, as plaintiff, against the appellee, as defendant, upon a written agreement between the parties, of which the following is a copy :

“It is hereby understood between S. C. Evans, agent

| | |
|-----|-----|
| 65 | 73 |
| 124 | 470 |
| 65 | 73 |
| 134 | 683 |
| 65 | 73 |
| 140 | 356 |
| 65 | 73 |
| 150 | 702 |
| 65 | 73 |
| 161 | 245 |
| 65 | 73 |
| 164 | 695 |

The Fort Wayne, Jackson and Saginaw R. R. Co. v. Husselman.

Ft. W., J. & S. R. R. Co., and Henry Husselman, that he gives the right of way through his land, for his subscription \$50, and stock in road \$450=\$500.00, and is to get out what ties he can at 25 cts. on track, and to board, at \$3.50 per week, hands, and to let them get out what ties he can spare on his land besides at 5 cts. each.

(Signed,) "S. C. EVANS, Agent of R. R. Co.,

his

"HENRY HUSSELMAN."

mark.

In its complaint, the appellant alleged, in substance, that the appellee, on the — day of —, 1869, entered into the agreement, above set out, with the appellant. a copy of which was filed with and made part of the complaint, whereby, in consideration that the appellant should permanently locate and construct its railroad upon the line at that time surveyed across and over the east half of the south-east quarter of section 8, and the west half of the south-west quarter of section 9, all in township 34 north, of range 13 east, in DeKalb county, Indiana, then and still owned by the appellee, and release him from paying a subscription of fifty dollars to the capital stock of the appellant, and pay him four hundred and fifty dollars, at its par value, in its capital stock, the appellee would sell and convey to the appellant the right of way for 100 feet in width, to be 50 feet in width on each side of the centre line of said railroad, as it was then and since located over said premises, and would within a reasonable time thereafter, upon the release of said subscription and payment of said stock, execute to the appellant a good and sufficient deed thereof; that, in pursuance of said agreement, the appellant took possession of said premises, and erected thereon lasting and valuable improvements, in this, that it constructed its railroad on said strip of land, and was then operating the same; that the appellant cancelled said stock subscription and tendered to the appellee

The Fort Wayne, Jackson and Saginaw R. R. Co. v. Husselman.

a properly executed certificate for four hundred and fifty dollars, in its capital stock, and then brought the same into court, to be held subject to his order; that the appellant had performed all the conditions of said agreement upon its part; and that, after it had so fulfilled its agreement as aforesaid, the appellant demanded of the appellee a deed for said premises, which he refused to execute. Wherefore the appellant demanded judgment, that the appellee should convey to the appellant said right of way, pursuant to said agreement, or that a commissioner should be appointed for that purpose, and for other proper relief.

Subsequently, the appellant filed a second paragraph, which is substantially the same, in its averments, as its original complaint, the substance of which we have given.

The appellee answered by a general denial; and, in a second paragraph, which was verified by his oath, he alleged that the written agreement in suit was never executed by him.

The issues joined were tried by a jury, and a general verdict was returned for the appellee. With their general verdict, the jury also returned their special findings on particular questions of fact submitted to them by the parties under the direction of the court; but, as there was no motion for judgment on these special findings, we need not set them out in this opinion.

The appellant's motion for a new trial was overruled by the court, and to this ruling it excepted; and judgment was rendered on the general verdict, in favor of the appellee and against the appellant, for the costs of suit.

The only error assigned by the appellant in this court is the decision of the circuit court, in overruling its motion for a new trial. The causes for such new trial, assigned by the appellant in its motion therefor, were, that the verdict was not sustained by sufficient evidence, and that it was contrary to law.

The Fort Wayne, Jackson and Saginaw R. R. Co. v. Husselman.

But one question, therefore, is presented for our consideration and decision, by the record of this cause and the appellant's assignment of error thereon, and that is, was there any legal evidence introduced on the trial of this cause, which tended to sustain the verdict of the jury? The appellant's learned attorneys have ably and elaborately discussed the sufficiency of the evidence to sustain the verdict of the jury, in their brief of this cause in this court. They quote, as the basis of their argument, from the decision of this court in the case of *The Toledo, etc., Railway Co. v. Goddard*, 25 Ind. 185., ELLIOTT, J., delivering the opinion, the following extract, on page 195 :

"We do not ignore the rule so repeatedly laid down by this court, that we will not reverse a cause upon the mere weight of evidence. The general rule is that if there is evidence from which the jury might reasonably find or infer a fact, and they find accordingly, this court will not disturb the verdict because there is other evidence in conflict with that on which the finding is based. But where the evidence in support of the finding is clearly and overwhelmingly, or conclusively contradicted, it would be a reproach to the law, and a flagrant outrage upon the rights of parties to refuse to disturb the verdict, simply because it had been found by a jury."

No one can find fault with the theory of the rule or of the exception thereto, so clearly stated by the distinguished judge, who wrote the opinion of the court, from which the extract cited was taken. Practically, however, the exception to the rule can not be safely used. For, how can this court or its judges possibly know, that the evidence in support of the verdict or finding has been "clearly and overwhelmingly, or conclusively contradicted?" To arrive at such a conclusion, must we not weigh the evidence? If so, how can we, as an appellate court, by merely reading the written evidence, without any personal knowledge of the

intelligence or character of the witnesses, or any of those living indicia before us by which men ordinarily judge of the truthfulness and credibility of evidence, determine that the evidence in support of the verdict or finding has been "clearly and overwhelmingly, or conclusively contradicted?" We know of no rule or measure by which an appellate court can be safely guided, when it undertakes to determine such a question. Whether or not the evidence in any case is clear, or overwhelming, or conclusive, is a question for the jury trying the cause, and the judge presiding at such trial. When a jury have passed upon this question, and returned their verdict, and when the court, under whose eye and within whose hearing the evidence has been introduced and the cause has been tried, has refused to disturb the verdict upon the weight or sufficiency of the evidence, we are clearly of the opinion, that it is neither our province, nor our duty, to reverse the judgment of the trial court, merely because it may seem to us, from our reading of the record, that "the evidence in support of the finding is clearly and overwhelmingly, or conclusively contradicted."

In the case at bar, as it was tried in the court below, the controlling question for decision by the jury was, whether or not the appellee had executed, or authorized any one to execute for him, the written agreement with the appellant sued on in this action. The record shows, that the case was tried by two different juries, and on each trial the general verdict and the special findings of the jury were in favor of the appellee. The appellant had the larger number of witnesses in its behalf, and if the weight of the evidence could be properly determined by merely reading it, as we find it in the record, it would seem to us that the verdict of the jury was not sustained by the weight of the evidence. The appellee testified in his own behalf, and was his only witness. His evidence was plain, straightfor-

Holman *et al.* v. Elliott.

ward, probable and consistent. He denied persistently, that he had executed, or had authorized any one to execute for him, the written agreement in suit. The jury, who saw and heard him testify, evidently believed his evidence, as they had the right to do, for they returned a verdict in his favor. The court, before whom and in whose hearing he testified, certainly believed and confided in his evidence; for the court refused, upon a proper motion made, to disturb the verdict of the jury, upon the weight or sufficiency of the evidence. In such a case, it is the duty of this court, as we understand our duty, to affirm the judgment of the court below. *Cox v. The State*, 49 Ind. 568; *Rudolph v. Lane*, 57 Ind. 115; and *Buskirk Prac.* 237, *et seq.*

The judgment is affirmed, at the appellant's costs.

HOLMAN ET AL. v. ELLIOTT.

FRAUDULENT CONVEYANCE.—*Sheriff's Sale of Real Estate Conveyed before Judgment.*—*Action to Recover.*—*Special Verdict.*—In an action to recover possession of real estate conveyed by a debtor during the pendency of an action against him for a debt, and afterward levied upon and sold to the plaintiff upon an execution issued upon the judgment recovered in such action, the jury returned a special verdict which was silent as to whether or not the debtor, at the time of making such conveyance, had other property subject to execution.

Held. that the defendant is entitled to judgment on the verdict.

From the Ripley Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellants.

W. D. Willson and *C. H. Willson*, for appellee.

BIDDLE, J.—Complaint by the appellee, against the appellants, in the statutory form, to recover the possession of certain lands.

Answer, general denial, and several special paragraphs. Demurrers, for the alleged want of facts, were sustained to some of the special paragraphs, and overruled to others, and exceptions reserved, but, as neither party has discussed these rulings, we pay no further attention to them. The general denial being in, under which all defences could have been given in evidence, whatever errors, if any, were committed in ruling upon the special paragraphs, became harmless after trial. The jury that tried the case rendered the following special verdict:

"1st. We, the jury, find the facts in this case to be as follows, to wit:

"1. We find, that, on the 1st day of August, 1867, Jesse L. Holman was the owner in fee-simple, and in possession, of the following described real estate: " (Here four of the six tracts of land described in the complaint are set out.)

"2. We find, that the defendants derived their title from Jesse L. Holman, by deed dated August 19th, 1867, except as to Dallas S. Holman, who obtained an additional deed on the 29th day of November, 1867, of John P. Paul, purporting to convey an individual interest in a certain tract described." (This tract is also set forth in the complaint.)

"3. We find, that, on the 27th day of August, 1867, in the Ripley Circuit Court, the plaintiff in this action recovered a judgment on a note signed by John Yater and Henry Yater, with Jesse L. Holman as security. The judgment was for \$1,827.08, and was rendered against all three of the makers of the note.

"4. We find, that, on the 19th day of August, 1867, and during the pendency of the suit on which the above judgment was rendered, Jesse L. Holman deeded said real estate as follows: To Rowland W. Holman" (certain lands described in the complaint); "and, in consideration

Holman et al. v. Elliott.

of said conveyances, the said Rowland W. Holman executed his note for one thousand dollars, payable to Margaret Holman, wife of Jesse L. Holman, to secure her support. We find further, that Rowland W. Holman paid \$130 on taxes that were due on said real estate. We find that said conveyance was made by Jesse L. Holman and wife, on account of his old age and infirm condition. We further find that said Rowland W. Holman received said conveyance in good faith, and without any intent on his part to cheat, hinder, delay or defraud the creditors of Jesse L. Holman, and without any knowledge of any intention on the part of Jesse L. Holman to do so.

"5. We further find, that, on the 19th day of August, 1867, said Jesse L. Holman and wife conveyed, by warranty deed, to Cornet J. Holman, one of the defendants in this action," (certain lands described in the complaint,) "and that, in consideration of said conveyance, the said Cornet J. Holman executed his note for \$1,000.00, payable to Margaret Holman, wife of said Jesse L. Holman, to secure her support, collectible by her only, and only during her lifetime. We find further, that Cornet J. Holman paid on taxes \$200.00 that was then due on said real estate. We find, that said conveyance was made by Jesse L. Holman and wife on account of his old age and infirm condition. We further find, that Cornet J. Holman received said conveyance in good faith, and without any intent on his part to cheat, hinder, delay or defraud the creditors of said Jesse L. Holman, and without any knowledge of any intention on the part of Jesse L. Holman to do so.

"6. We further find, that, on said 19th day of August, 1867, said Jesse L. Holman and wife conveyed to Dallas L. Holman, by warranty deed, certain lands," (here is described the remaining tract claimed in the complaint,) "and that, in consideration of said conveyance, the said Dallas S. Holman executed his note for \$1,000.00, payable to Margaret Holman, wife of said Jesse L. Holman, to secure her sup-

port, collectible by her only, and only during her lifetime. We find, that said conveyance was made by Jesse L. Holman and wife on account of his old age and infirm condition. We find further, that Dallas S. Holman received an additional deed on the 29th day of November, 1867, of John P. Paul, purporting to convey an undivided interest in the above described real estate, and that he paid a valuable consideration for the same, and that Jesse L. Holman is the father of said Rowland W. Holman, Cornet J. Holman and Dallas S. Holman, and all of said real estate is situated in Ripley county, and State of Indiana, and that, at the time of said conveyances, Jesse S. Holman was of the age of 65 years, and that, at the time, he had in his possession notes on solvent persons to the amount of \$4,000.00, which he placed in the hands of Rowland W. Holman for the purpose of paying any outstanding indebtedness against him at the time, and that said notes were collected by said Rowland W. Holman and appropriated by him to that purpose. And we find, that the parties took possession of their respective tracts in a few days after the conveyances were received by them, and in a few days after the conveyances were made.

"7. We further find, that, upon the judgment aforesaid, an execution was issued by the clerk of the Ripley Circuit Court, and placed in the hands of the sheriff of Ripley county, Indiana, and by him levied upon the lands in suit, and by him advertised and sold on the 11th day of May, 1872, to the plaintiff herein, for the sum of \$600.00, and that the plaintiff had received of the sheriff of said county a sheriff's deed for the said land.

"8. We further find, that, on the 9th day of April, 1872, the sheriff levied said execution upon the land described in the complaint, and that there was no evidence given why the levy on the other land was abandoned or why it was not sold.

Holman *et al.* v. Elliott.

"9. We find, that the judgment on which the land was sold directed that the same be sold without relief from valuation or appraisement laws, and that the land was not appraised.

"10. We find, the real estate sold by the sheriff was, at the time of sale, of the value of \$10.00 per acre.

"If, upon this state of facts, the law is with the plaintiff, then we find for the plaintiff.

"If, upon this state of facts, the law is with the defendants, then we find for the defendants."

Upon this special verdict the court held the law to be with the plaintiff, and rendered judgment that he recover possession of the real estate described in the complaint. The appellants reserved their exceptions.

Did the facts found by the jury in the special verdict authorize the judgment of the court? This is the decisive question in the case.

A special verdict must find all the facts necessary to support the judgment. There is a fatal defect in this verdict. The facts found do not authorize the judgment rendered. There is no finding that Jesse L. Holman had no other property than the land conveyed, at the time he made the deeds which are attacked as fraudulent, out of which the appellee could not have collected his judgment in the usual course of execution. For aught that appears in the special verdict, Jesse L. Holman may have had abundance of property besides the land conveyed, subject to execution, at the time and after the deeds complained of were executed; if so, the appellee can not disturb them, even though they were made without consideration. This principle is well settled. *Ewing v. Patterson*, 35 Ind. 326; *Baugh v. Boles*, 35 Ind. 524; *Morgan v. Olvey*, 53 Ind. 6; *Alford v. Baker*, 53 Ind. 279; *Sherman v. Hogland*, 54 Ind. 578; *Eagan v. Downing*, 55 Ind. 65; *Evans v. Hamilton*, 56 Ind. 34; *Bentley v. Dunkle*, 57 Ind. 374; *Romine v. Romine*, 59 Ind. 346; *Price v. Sanders*, 60 Ind. 310.

Meyer *et al.* v. Bell.

Indeed, it seems by the latter part of the sixth finding, that Jesse L. Holman had provided other means besides the lands to pay his outstanding debts. Besides, the verdict finds that the deeds were not fraudulent.

The judgment is reversed, at the costs of the appellee, with instructions to the court below to render judgment in favor of the appellants.

MEYER ET AL. v. BELL.

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EVIDENCE.—*Statements of Third Person.*—*Hearsay.*—*Admission.*—In an action to recover for the value of certain chattels delivered by the plaintiff to the defendant, to be sold on commission, which had been sold by the latter and converted to his own use, a statement made by a third person, to the plaintiff, in the absence of the defendant, that the latter had said to such third person that he would pay a certain price for such chattels, is hearsay and incompetent.

From the Vanderburgh Circuit Court.

W. F. Smith and *A. Dyer*, for appellants.

J. S. Buchanan, *H. C. Gooding* and *C. Buchanan*, for appellee.

PERKINS, J.—"This was an action by Henry Bell, against Jacob Meyer and Michael Meyer.

"The first paragraph of the complaint alleges that the plaintiff had delivered to the defendants a large lot of cedar posts, to be sold on commission, and that the defendants had sold the posts and received fifteen hundred dollars therefor, and that, although often demanded, they had failed and refused to account for the proceeds.

"The second paragraph alleges, that they had received the posts, to be sold on commission, and had converted the

Meyer et al. v. Bell.

same to their own use. The defendants answer a general denial, a special denial of any demand, and allege that they have fully accounted to the plaintiff, except as to a small sum which they bring into court.

"Trial; verdict for the plaintiff in the sum of four hundred and eighty-seven dollars. Motion for a new trial overruled, and judgment on the verdict. The motion for a new trial assigns, for cause, error of the court in admitting in evidence, over the objection of the defendants, that part of the testimony of the plaintiff which consisted of a conversation between the plaintiff and John Travis, held and spoken in the absence of the defendants. The motion also assigns, for cause, the insufficiency of the evidence to sustain the verdict. The evidence is all in the record.

"During the trial the plaintiff was permitted to testify as follows: .

"'Before this, I had employed John Travis to sell them' (the posts). 'He had spoken to me of the Meyers, who had agreed to take a few. Travis said the Meyers were to give thirty cents for the short posts and seventy cents for the long posts.'

"The defendant duly objected to the evidence as hearsay, irrelevant and incompetent, and, being admitted over these objections, the ruling was excepted to at the time."

We take the above statement of the case from the brief of appellants.

We take the following from the brief of the appellee:

"The statement of the issues in appellants' abstract is all that is necessary to enable the court to determine the questions raised in this case.

"The first objection urged by appellants is the statement of appellee while giving his evidence on the trial of the cause; and this is the statement objected to: 'Before this I had employed John Travis to sell the

posts. He had spoken to one of the Meyers, who had agreed to take a few. Travis said the Meyers had agreed to give thirty cents for the short posts, and seventy cents for the long posts.' This, it is claimed, was hearsay evidence, and the court erred in letting it go to the jury.

"In answer to this, we submit that this evidence was harmless, and tended to prove no issue made by the parties on the trial of the cause."

It is assigned for error that the court overruled the motion for a new trial.

One of the causes assigned for a new trial was, that the circuit court permitted the appellee Bell to testify to the statement of Travis, that "the Meyers were to give thirty cents for the short and seventy cents for the long posts."

This testimony was hearsay, inadmissible, and the court erred in allowing it to go to the jury. But it is claimed that the error was a harmless one. Can this court so decide?

The main question in controversy on the trial of the cause was the value of the posts; Bell, the appellee, insisting that the short posts were worth forty cents apiece, and the long ones seventy-five, while the appellants insisted that the short posts were worth no more than twenty-five cents apiece, and the long ones no more than forty or fifty cents apiece.

There was great conflict in the evidence on this point.

Now, it is easy to see that, if the Meyers had told Travis that they would give thirty cents for the short posts and seventy cents for the long ones, it might have been regarded by the jury as an indirect admission by them that the posts were each worth the sum stated. If Travis, the proper person to testify to the fact if it existed, had done so, it might naturally have had a large influence upon the jury. The permission by the court, to a third person, to testify to a hearsay statement of the fact, would authorize

Rooker v. The State.

the jury to give weight to the statement as legal evidence. Under the circumstances surrounding this case, we can not say the error in admitting the testimony in question was a harmless one.

No other question in the case requires the expression of an opinion.

The judgment is reversed, with costs; cause remanded for a new trial.

ROOKER v. THE STATE.

CRIMINAL LAW.—*Uttering Forged Endorsement of Promissory Note.—Indictment Containing Copies of Note and Endorsement.—Evidence.—Variance in Dates in Note and Copy.*—On the trial of a defendant charged with having uttered a forged endorsement of a promissory note, upon an indictment containing copies of both the note and endorsement, the State gave in evidence the original note and endorsement, which corresponded with such copies in every material part, except that there was an erasure in the figures indicating the date of the note, the figures first made being the same as those appearing in the indictment and the amended figures fixing the date a day earlier.

Held, that there was a fatal variance, and that the evidence was incompetent.

Held, also, that a copy or description of the note was essential to the sufficiency of the indictment.

From the Marion Criminal Circuit Court.

R. E. Smith, D. Moss and R. R. Stephenson, for appellant.

T. W. Woollen, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

NIBLACK, J.—The proceeding in this case was a criminal prosecution for forgery.

The indictment contained two counts.

The first charged Oliver P. Rooker, the appellant, with uttering and publishing, as true and genuine, a certain false, forged and counterfeit promissory note, setting out

Rooker v. The State.

such note in full, and averring an intent to defraud one of the alleged makers of the note.

The second count charged, that the appellant, on the 26th day of August, 1876, did utter and publish, as true and genuine, two certain false, forged and fraudulent indorsements of a certain promissory note for the payment of money, which note was in the words and figures following, that is to say :—

“\$1,638.66. INDIANAPOLIS, Aug. 26th, 1876.

“Ten days after date, we promise to pay to the order of Wm. W. Rooker and J. I. Rooker, negotiable and payable at the Indiana National Bank of Indianapolis, Indiana, sixteen hundred and thirty-eight $\frac{8}{100}$ dollars, with five per cent. attorney's fees upon the principal of this note, value received, without any relief whatever from valuation or appraisal laws, with interest at the rate of ten per cent. per annum after maturity. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

“OLIVER P. ROOKER,

“S. P. ROOKER.”

Which indorsements consisted of the names of “Wm. W. Rooker” and “J. I. Rooker,” written upon the back of said note, and were intended to represent the names of William W. Rooker and James I. Rooker, whom it was averred the appellant intended to defraud.

The appellant moved to quash both counts of the indictment, applying his motion separately to each, but his motion was overruled.

Upon a trial by a jury the appellant was found guilty upon the second count in the indictment, and his punishment fixed at a fine of five dollars and imprisonment in the state-prison for the term of four years. After overruling a motion for a new trial, raising, amongst other things, questions upon the evidence, the court rendered a judgment of conviction upon the verdict.

Rooker v. The State.

During the progress of the trial, what purported to be an original note, substantially the same in all respects as the copy set out in the second count of the indictment, as above stated, except as to the date, was offered and admitted in evidence on the part of the State, over the objection of the appellant. By agreement of parties, that note, in its original form, has been attached to, and certified to this court as a part of, the bill of exceptions for our inspection here. As it comes to us there is an erasure in the date of the note which renders it uncertain as to what figures were first made to indicate the day on which it purported to have been executed, but an inspection of the note convinces us that the amended figures upon the face of it make it bear the date of August 25th, 1876, one day earlier than the date named in the copy set out in the second count of the indictment, and in consequence made it fall due one day sooner than the day named in the copy.

But it is argued, that, as the *gravamen* of the offence charged by this second count of the indictment was the uttering and publishing of the forged endorsements only upon the note set out in that count, the precise terms and contents of such note were not directly involved in the description of the crime charged, and that, hence, so much of such count as purported to set out an exact copy of the note was surplusage merely, not required to be proved upon the trial; that consequently, as strict proof of the precise terms and contents of the note was not required, the alleged variance as to dates, conceding it to exist, was immaterial, and worked no injury to the appellant.

We can not, however, agree to the rule of criminal pleading thus insisted upon. It was necessary that the note should be particularly described and set out, so that the character of the instrument on which the alleged forged endorsements were made should be made to appear to the court. It is only as to certain classes and descrip-

Fisher *et al.* v. Freeman.

tions of instruments, or paper writings, that a forged endorsement is prohibited, or could be made to defraud any one. 2 R. S. 1876, p. 439, sec. 30.

But suppose the note was unnecessarily set out in the count of the indictment upon which the appellant was convicted, still, the note being thus set out, it became a matter of description, and had to be proved as alleged. *Morgan v. The State*, 61 Ind. 447.

In any view of this case which we have been able to take, the variance between the note and the copy set out and referred to as above was material, and therefore fatal. The admission of the note in evidence was consequently erroneous.

We have not considered the sufficiency of the indictment, or any of the other questions discussed by counsel. See, however, the case of *Yount v. The State*, 64 Ind. 443.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the necessary notice for a return of the prisoner.

FISHER ET AL. v. FREEMAN.

HEIRS.—*Action Against, on Judgment Against Ancestor.*—*Sheriff's Sale on Decree Against Decedent.*—*Purchase by Administrator Personally.*—*Surplus of Purchase-Money.*—*Judgment without Exception.*—*Limitations.*—*Lien.*—A judgment debtor having died intestate, leaving no property except a tract of real estate encumbered by a mortgage, and one of the heirs having been appointed administrator, the judgment creditor filed his judgment, which had been rendered more than ten years previous to the death of the debtor, against the estate, but the administrator neither allowed the claim nor took any steps to sell real estate to pay the same. The real estate having been sold and conveyed to the administrator personally, at a

Fisher *et al.* v. Freeman.

sheriff's sale on a decree foreclosing such mortgage, for a sum exceeding the amount necessary to satisfy such decree and costs, the judgment creditor brought an action, and recovered, for the amount of his judgment, against the heirs, who neither objected nor excepted to the form of the judgment.

Held, on motion for a new trial, that the surplus at such sheriff's sale belonged to the estate, and not to the heirs, and, the evidence supporting the finding, that the Supreme Court will not disturb the judgment.

Held, also, that, though such judgment had ceased to be a lien on the real estate, it might be a valid claim against the estate.

From the Lake Circuit Court.

E. C. Field, for appellants.

M. Wood and *T. J. Wood*, for appellee.

PERKINS, J.—John G. Fisher died on the 4th day of May, 1862, leaving no personal, but a piece of real, estate, which was incumbered by a mortgage. He left heirs and creditors.

On the 21st day of March, 1867, John Fisher, a son and one of the heirs of said John G. Fisher, deceased, was appointed, and duly qualified, as administrator upon the estate of said John G. Fisher, deceased. He made no application to sell said incumbered real estate to pay debts.

William Freeman was a judgment creditor of said John G. Fisher; and, on the 30th of April, 1867, filed his judgment as a claim against the estate of John G. Fisher. It was not allowed; no action touching the claim was had.

This was a little more than a month after John Fisher's appointment as administrator as aforesaid.

At the March term, 1867, of the Lake Circuit Court, said John Fisher, administrator and an heir as we have seen, with the other heirs of said John G. Fisher, brought suit to redeem the land above mentioned from the mortgage upon it. The mortgage lien amounted to four hundred and eighty-eight dollars and thirty-nine cents. The complaint in the suit to redeem averred that the land mortgaged was of the value of two thousand four hundred dollars.

Fisher et al. v. Freeman.

On the 24th of October, 1868, said land was sold by the sheriff to satisfy the mortgage lien, and purchased by said John Fisher, administrator and heir as aforesaid, for the sum of eight hundred and fifteen dollars, and he received a deed from the sheriff to the land.

On the 16th of November, 1875, said Freeman commenced this suit, in the Lake Circuit Court, against said heirs, including said administrator, for the collection of his said judgment rendered on the 19th day of September, 1860, against John G. Fisher, then in life, and the ancestor of the heirs, appellants in this suit, and he recovered.

The assignment of errors is as follows :

"The court erred in overruling the demurrer to the second and third paragraphs of the complaint; and,

"The court erred in overruling the motion for a new trial."

No objection to the form of the judgment or decree was made; no motion to modify or change it was interposed. See *Thompson v. Davis*, 29 Ind. 264. No brief, except a short one on the application for a supersedeas, has been filed by the appellants, and it does not allude to the action of the court upon the demurrer. Hence the first assignment of error is waived.

The judgment sued on by Freeman, even though it had ceased to be a lien on the land, ten years having elapsed since its rendition, might still have been valid as a claim against the estate of John G. Fisher, deceased, the limitation on judgments being twenty years. The surplus on sale of the land to satisfy the mortgage lien belonged to that estate. How it could be appropriated to the payment of the judgment in question, is not a point presented for our decision.

The finding of the court was supported by the evidence, and no exception was taken to any ruling of the court occurring at the trial, or, as we have already said, to the rendition of the judgment as it was rendered.

The Evansville and Crawfordsville R. R. Co. v. Smith.

See, as to the right of the administrator to purchase, *Martin v. Wyncoop*, 12 Ind. 266.

The judgment is affirmed, with costs.

THE EVANSVILLE AND CRAWFORDSVILLE R. R. CO. v. SMITH.

RAILROAD.—*Killing Stock.—Fact Inferred from Evidence.—Supreme Court.—*

Where, in an action against a railroad company, under the statute, for killing stock, there is evidence, that, at the time of the killing, the defendant owned and operated the railroad upon which the stock was killed, the court trying the cause might reasonably infer therefrom, in the absence of evidence to the contrary, that the locomotive and cars which struck and killed the stock were the property of the defendant; and in such case the Supreme Court will not disturb a finding for the plaintiff merely for want of direct evidence of such ownership.

SAME.—*Weight of Evidence.*—The Supreme Court will not disturb a finding on the mere weight of the evidence.

From the Knox Circuit Court.

F. W. Viehe and *R. G. Evans*, for appellant.

G. G. Reily and *W. C. Johnson*, for appellee.

Howk, C. J.—In this case the appellee sued the appellant, before a justice of the peace of Knox county, to recover damages for the wounding and killing of a cow and bull owned by the appellee.

The complaint was in two paragraphs, in the first of which the appellee alleged, in substance, that, on the 18th day of December, 1876, his cow and bull, at a point in said county, entered upon the appellant's railroad, where the same was not securely fenced in, and the appellant then and there, by its locomotive and cars, ran against and upon said cow and bull, of the values, respectively, named in said paragraph, thereby wounding and killing the same, to the appellee's damage seventy dollars.

| | |
|-----|-----|
| 65 | 92 |
| 159 | 29 |
| 159 | 33 |
| 159 | 37 |
| 65 | 92 |
| 159 | 558 |

The second paragraph was substantially the same as the first paragraph of the complaint, except that the appellee, in said second paragraph, only sued to recover damages for the wounding and killing of his cow. On both paragraphs the appellee demanded judgment for one hundred dollars, and for other proper relief.

Before the justice, the appellee had judgment for seventy dollars, from which there was an appeal to the circuit court.

In this latter court, the cause was tried by the court, and a finding was made for the appellee, assessing his damages in the sum of seventy dollars ; and the appellant's motion for a new trial having been overruled, and its exception entered to this ruling, the court rendered judgment on its finding.

The only error assigned by the appellant in this court is the decision of the circuit court in overruling its motion for a new trial. The causes for such new trial were, that the finding of the court was contrary to the evidence, and that it was not sustained by sufficient evidence. So that the only question for our decision, in this case, is this: Was there evidence introduced, on the trial of this cause, which tended to sustain the material averments of the complaint, and the finding of the court thereon? If there was, we think it is settled, by an almost innumerable number of our decisions, that this court will not, and ought not to, disturb the finding of the court below, as the trier of the facts. It was averred in the complaint, that the appellant was the owner of and operating a line of railroad in Knox county, and that, by its locomotive and cars, it ran upon and against the appellee's cow and bull, etc.

It is said by appellant's counsel, that these allegations are material, and we think they are material. *The Toledo, etc., R. W. Co. v. Weaver*, 34 Ind. 298.

There was evidence introduced on the trial, to the effect,

Welshbillig *et al.* v. Dienhart.

that the appellant owned and operated the railroad in question. There was no direct or positive evidence introduced to show that the appellant owned the locomotive and cars, with which it operated its line of railroad; but it seems to us, that the court trying the cause might have fairly and reasonably inferred and found, from the evidence adduced, in the absence of any evidence to the contrary, that the appellant operated its railroad with its own locomotive and cars. We think, therefore, that the evidence in the record tended to sustain the finding of the court, on the points in question; and in such case, as we have seen, we can not disturb the finding. *The Evansville, etc., R. R. Co. v. Snapp*, 61 Ind. 303.

In our opinion, the court did not err in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

WELSHBILLIG ET AL. v. DIENHART.

CONTRACT.—Action on Lease, for Rent.—Answer Setting up Previous Verbal Contract.—Fraud.—In an action by the lessor, against the lessee, on a written lease for a term of years, which stipulated for the payment of specified sums at stated intervals, as rent, the defendant answered admitting that the plaintiff was entitled to the amount demanded, but setting up, and alleging a breach of, a previous verbal contract by the lessor, with the lessee, to make certain improvements on the property, and averring that such contract was part of the consideration of the lease.

Held, on demurrer, that the answer is insufficient.

Held, also, that an averment in the answer, that the lessor obtained such lease by "falsely and fraudulently representing" to the lessee that he had already contracted to have such improvements made, does not sufficiently charge fraud.

SAME.—Issue.—Evidence.—Burden of Proof.—Under the issues formed by the complaint and answer in such case and a reply specially denying the making of the verbal contract set up in the answer, the plaintiff was entitled, in the absence of any evidence, to recover the amount sued for, the burden of proof being on the defendant.

Welshbillig *et al.* v. Dienhart.

FRAUD.—Representation.—A representation upon which fraud can be predicated must be of an alleged existing fact, and can not be founded upon a mere promise.

SAME.—Failure of Consideration.—Partial Answer.—An answer of partial failure of consideration, pleaded to the whole of a complaint, is insufficient.

REFORMATION OF WRITING.—An answer seeking to reform an instrument in suit must allege that the reform sought is according to the agreement of both parties at the time the instrument was written.

HARMLESS ERROR.—The sustaining of a demurrer to a paragraph of a pleading is harmless, where the facts alleged therein are admissible in evidence under a remaining paragraph.

From the Tippecanoe Circuit Court.

G. S. Orth and *J. Park*, for appellants.

J. M. LaRue and *F. B. Everett*, for appellee.

BIDDLE, J.—Complaint on a written contract dated October 1st, 1875, for the collection of rent, made by Peter Welshbillig, as principal, and Joseph Beyer and John G. Metzger as sureties, with Peter Dienhart, by which Dienhart leased to Welshbillig the premises known as the "Germania Hotel," in the City of Lafayette, for a term of five years, at a stipulated rent, payable at fixed periods. The sufficiency of the complaint was not questioned, nor were the facts averred denied by answer; but the appellants answered as follows:

1. After admitting the execution of the lease, and that the rent was due and unpaid, as alleged in the complaint, the defendants averred, that, in April, 1875, the plaintiff was, and still is, the owner of said property known as the "Germania Hotel," and proposed to Welshbillig, that, if he would take a lease of the property for a term of years, and use and occupy the same as a first-class hotel, the plaintiff would proceed at once and put the property in thorough repair, in all respects suitable for a first-class hotel, and particularly that he would construct certain water closets, privy vaults and sewers with proper drainage; that Welshbillig accepted said proposition and agreed that he would lease

Welshbillig et al. v. Dienhart.

the property for the term of five years, and pay the rent therefor as specified in said lease ; that the plaintiff commenced making said improvements and continued the same until the 1st day of October, 1875, when the same had been so far completed as to enable Welshbillig to take possession of a part of said premises, which he did on the day last aforesaid ; that the plaintiff continued to make said improvements until about the 15th day of October, 1875, when he suggested that the same be postponed until the completion of the water-works then in the course of construction by the City of Lafayette, so as to introduce water from said works into said property, to which suggestion Welshbillig gave his consent ; that thereafter so much of said agreement as is expressed in the lease set out in the complaint was reduced to writing as therein stated ; that the lease, although bearing date October 1st, 1875, was not in fact executed until March 21st, 1876, the said Welshbillig in the mean time occupying said premises, though at great inconvenience, and paying rent therefor according to the terms specified in the lease, relying upon the plaintiff to complete the improvements as above specified ; that the plaintiff fraudulently refused and still refuses to perform his part of the contract in completing said improvements, although the water-works were so far completed on the — day of April, 1876, as to permit the introduction of water therefrom into the property so leased, and that without such improvements said property is unfit to be used as a first-class hotel ; whereby Welshbillig has been damaged to the amount of two thousand dollars.

The defendants further averred in this paragraph, that the lease was obtained by fraud, covin and misrepresentation in making said previous contract, which is again set out in terms, and failing to perform the same, and by “falsely and fraudulently alleging that he had made all his contracts and arrangements to have said improvements fully

completed in a reasonable time, and that he would so finish and complete the same; and said Welshbillig, fully relying on the pretended good faith of said plaintiff, and in full confidence of the truth of his allegations and representations, executed, with his sureties, the said lease;" that, since the execution of said lease, the plaintiff falsely and fraudulently refuses to complete said improvements.

Wherefore the defendants pray judgment for said sum, deducting the amount of said rents, and for further relief.

2. The second paragraph of answer is so essentially the same as the first in its averments of fact—indeed, we can see no legal difference between them—that we do not state it.

3. The third paragraph of answer avers the same previous parol contract as that set out in the first paragraph, alleging that the consideration specified in the lease was not the entire consideration which induced its execution; that the said previous contract was also a part of the consideration for making the lease; that said contract was not performed. Wherefore the consideration has in part failed.

4. The fourth paragraph of answer differs in no legal aspect from the first, except that it does not allege fraud, and sets up the previous parol contract, and its breach by the plaintiff, as a set-off instead of a counter-claim.

5. The fifth paragraph of answer does not differ from the fourth in any respect, as far as we can see, except that the facts are not so fully stated.

6. The sixth paragraph of answer sets up a verbal contract, the same as that set up in the first paragraph, and avers that the lease "does not contain and set out the entire agreement of the parties thereto," but "that, by mistake, oversight or inadvertence of the parties thereto," the verbal agreement was omitted in the said written agree-

Welshbillig *et al.* v. Dienhart.

ment, and "asks that said written instrument sued upon be so reformed as to express the whole of the agreement between the parties."

The plaintiff demurred separately to each paragraph of the answer, upon the ground that neither of them stated facts sufficient to bar the action. The court sustained the demurrers to the first, second, third, fourth and sixth paragraphs, and overruled the demurrer to the fifth paragraph. The plaintiff then replied to the fifth paragraph of answer, that the parties never made any contract of leasing, verbal or written, except the lease alleged in the complaint.

Upon the issue thus joined the court tried the case, and found for the appellee. By a motion for a new trial, the appellants have presented the question of the sufficiency of the evidence to sustain the verdict, which, with the question raised by demurrers, are all which the assignments of error present for our decision.

1. It does not seem to us that the court erred in sustaining the demurrer to the first paragraph of answer. It seeks to change a written contract by a verbal contract previously made, and to set up one unexecuted contract in bar of another unexecuted contract. That neither of these things can be done is a principle too well settled to require authorities in its support. *McMahan v. Spinning*, 51 Ind. 187; *Gilpin v. Wilson*, 53 Ind. 443. Nor was the fraud sufficiently alleged in the first paragraph of answer to constitute a defence. It amounted to no more than a breach of contract. This is never sufficient to constitute fraud. A representation upon which fraud can be predicated must be of an alleged existing fact, and can not be founded upon a mere promise. *Fouty v. Fouty*, 34 Ind. 433; *The President and Trustees of Hartsville University v. Hamilton*, 84 Ind. 506; *Adkins v. Adkins*, 48 Ind. 12; *Reagan v. Hadley*, 57 Ind. 509. But the appellants insist that the averment, that "the plaintiff falsely and fraudu-

lently alleged that he had made all his contracts and arrangements to have said improvements fully completed in a reasonable time," shows a fraudulent, affirmative, existing fact. It is enough to say in answer to this view, that the allegation is not negatived in the pleading; the only negative alleged is, that the plaintiff failed to make the improvements, which is no more than a breach of contract.

2. The second paragraph of answer being the same, in legal effect, as the first, we must hold the ruling applicable to the first to be also applicable to the second.

3. The third paragraph of answer is pleaded as a failure of consideration to the whole complaint, and at most sets up a failure only as to part; it is bad for this reason, if for no other.

4. The sixth paragraph of answer seeks to reform the contract sued upon, but does not show sufficient ground for the reformation. To reform an instrument for a mistake in writing it, it must be shown that the reform sought is according to the agreement of both parties at the time the instrument was written and the mistake made. When an instrument is written as one party understands it, and not as the other party understands it, there is no ground for reform. A reformation can not make a new instrument which the parties never agreed to make. *Allen v. Anderson*, 44 Ind. 395; *Nicholson v. Caress*, 59 Ind. 89; *Hamar v. Medsker*, 60 Ind. 413. Measured by these authorities, it is clear that the sixth paragraph of answer is insufficient.

5. It is not clear to us why the court sustained the demurrer to the fourth paragraph of answer, and overruled it to the fifth. Both paragraphs seem to us to be in legal effect the same, nor need we closely enquire whether the court might not have sustained the demurrer to the fifth as well as to the fourth paragraph. The appellee took is-

Kester et al. v. Hulman et al.

sue upon the fifth paragraph, and the appellants, at the trial, had all the benefits under the fifth which they could have had, upon trial, under the fourth. The error, therefore, in sustaining the demurrer to the fourth paragraph, if any existed, became harmless after the trial of the facts was had under the fifth paragraph.

6. The remaining question in the case, discussed by the parties in their briefs, arises upon the sufficiency of the evidence to support the finding of the court. The fifth paragraph of answer, upon which the trial was had, admitted, in terms, the contract as alleged in the complaint, and that the rent was due and unpaid, as therein averred—indeed, each paragraph of the answer expressly admits the same facts—and sets up the previous verbal contract, and its breach by the appellee as a set-off. The reply denied the existence of the previous contract. Upon this issue, we can not see that it was necessary for the appellee to introduce any evidence. The *onus* lay upon the appellants to prove the previous contract, its breach and the damages; tending to prove which, they neither introduced nor offered any evidence whatever. Upon the whole record, it does not appear to us that the appellants have been injured in the least.

The judgment is affirmed, at the costs of the appellants.

KESTER ET AL. v. HULMAN ET AL.

CONTRACT.—*Agreement to Pay Promissory Note of Another.—Extension of Time.—Mortgage.—Sheriff's Sale.—Redemption.—Measure of Damages.*—A purchaser of the equity of redemption of certain real estate which had been sold at sheriff's sale on execution to one who also held a mortgage thereon to secure the payment of an unmatured promissory note, executed to him by such purchaser's grantor, entered into a written agreement with

Kester et al. v. Hulman et al.

the mortgagee, which recited the foregoing facts and stipulated that, in consideration of the payment, therein acknowledged, to the mortgagee, of the redemption money on such sheriff's sale, with interest to date, the mortgagee agreed to extend the time of payment of a specified portion of such note for one year after its maturity, and, if that instalment, with ten per cent. interest to that time on the whole amount of the note, was then paid, the time of payment of the residue should be extended another year; and the said purchaser agreed also, "in consideration of the premises, to pay said note in accordance with the tenor and effect thereof, and at the time in this agreement provided."

Held, in an action on the agreement, that it is valid.

Held, also, that the measure of damages is the amount that could have been recovered in a direct action on the note.

From the Vigo Circuit Court.

S. C. Davis, S. B. Davis and E. D. Seldomridge, for appellants.

M. G. Buff and S. M. Beecher, for appellees.

Howk, C. J.—In this action the appellees, as plaintiffs, sued the appellants, as defendants, upon their written agreement, of which the following is a copy:

"Jacob Foltz is indebted to Hulman & Cox in the sum of \$675.00, by his promissory note dated February 10th, 1874, due two years after date, with ten per cent. interest from date. The said note is secured by mortgage on the following real estate in Sullivan county, Ind., to wit: The north-west quarter of the south-west quarter of sec. three (3), and the south-east quarter of the north-east quarter of sec. four (4), all in town. nine (9) north, of range eight (8) west, containing 80 acres; said mortgage given by Jacob Foltz and his wife, Emily Foltz, on the 10th day of February, 1874, which mortgage was duly recorded on the 14th day of March, 1874, in record book 'D,' page 396.

"On the 5th day of June, 1875, said real estate was sold by the sheriff of said county of Sullivan, on an order of sale from the Sullivan Circuit Court, in favor of John J. Brake and against said Jacob and Emily; that the same was bought in by Hulman & Cox for the sum of two hun-

Kester et al. v. Hulman et al.

dred and fifty-three dollars (\$253.00), and they received from said sheriff a certificate of purchase therefor; that, on the 21st day of June, 1875, John R. Kester and Roswell G. Wheeler purchased said real estate from Jacob Foltz, and took a conveyance therefor from Jacob Foltz and Emily, subject to the liens of Hulman & Cox as aforesaid. Said Kester & Wheeler, desiring to get an extension of time on said note, the following agreement is made, to wit: Kester & Wheeler pay Hulman & Cox two hundred and fifty-four $\frac{3}{100}$ dollars, being amount due on said sale, and also one hundred nineteen $\frac{3}{100}$ dollars, being the interest on said note up to the 16th day of November, 1875, the receipt of which is hereby acknowledged, and in consideration of which Hulman & Cox agree to extend the time on said note as follows, to wit: three hundred and seventy-five dollars of said note till the 10th day of February, 1877, and, if the said Kester & Wheeler shall, on or before said 10th day of February, 1877, pay said three hundred and seventy-five dollars, together with ten per cent. interest on the whole of said note, then and in that case said Hulman & Cox agree to extend the time of payment on the remaining three hundred dollars till the 10th day of February, 1878, and the said Kester & Wheeler agree, in consideration of the premises, to pay said note in accordance with the tenor and effect thereof, and at the time in this agreement provided, this 16th day of November, 1875.

(Signed,)

“KESTER & WHEELER.”

In their complaint the appellees alleged, in substance that, on the 10th day of February, 1874, one Jacob Foltz executed to them his note for \$675.00, with interest at the rate of ten per cent., and five per cent. attorney's fees if suit should be brought on said note, a copy of which note was filed with and made part of said complaint; that, on the 16th day of November, 1875, the appellants, by their firm name of Kester & Wheeler, executed to the appellees

Kester et al. v. Hulman et al.

the agreement, a copy of which we have set out above, whereby the appellants assumed and agreed to pay the said note, in the manner and form set forth in said agreement, a copy of which was filed with and made part of said complaint, and that the appellants had wholly failed to comply with any of the terms of their said agreement; wherefore the appellees said that the appellants were indebted to them in the sum of \$775.00, and in the further sum of \$40.00, the attorney's fee in said note and agreement provided, which sums were due and unpaid. Wherefore, etc.

To this complaint the appellants demurred upon the ground that it did not state facts sufficient to constitute a cause of action; which demurrer was overruled by the court, and to this ruling they excepted. The appellants then answered in two paragraphs, to each of which the appellees demurred for the want of sufficient facts therein to constitute a defence to their action; which demurrers were sustained by the court, and to these decisions the appellants excepted. The cause was tried by the court without a jury, and a finding made for the appellees in the sum of \$837.75, and judgment was rendered accordingly. The appellants' motion for a new trial was overruled by the court, and to this decision they excepted and filed their bill of exceptions, and appealed to this court.

The appellants have here assigned, as errors, the following decisions of the court below:

1. In overruling their demurrer to the appellees' complaint;
2. In sustaining the appellees' demurrer to the first paragraph of their answer;
3. In sustaining the demurrer to the second paragraph of their answer;
4. In overruling their motion for a new trial.

Without special regard to the errors assigned by the ap-

Kester et al. v. Hulman et al.

pellants, we will consider and decide the questions discussed by their counsel in their argument of this cause in this court, in the same order in which they have presented them. The point is made by counsel, and pressed with much earnestness and at great length, that the agreement of the appellants in suit "is not binding, and is of no avail, for the reason that it was an agreement by appellants to pay the debt of Foltz, without any consideration on the part of Hulman & Cox."

It seems to us, that this point is not well taken, and that the position of the appellants' counsel, in reference thereto, is wholly untenable. The terms of the agreement are such as to show, upon its face, a valuable consideration, amply sufficient, we think, to sustain the contract, and to make it valid and binding, as well upon the appellees as upon the appellants. It appeared from the agreement, that the appellees held a certificate of purchase, from the sheriff of Sullivan county, on a sale made by him of certain real estate, in said county, on an execution against Jacob Foltz as his property; and that they also held a note of said Foltz, secured by mortgage executed by him and his wife on the same real estate, which note would become due on the 10th day of February, 1876. It further appeared upon the face of said agreement, that the appellants had become the purchasers of said real estate from said Jacob Foltz, and had taken a conveyance thereof from said Foltz and his wife, subject to the claims of the appellees on said real estate, under their said certificate of purchase thereof, and their said mortgage thereon. The appellants wanted an extension of the time of the payment of said note, so secured by mortgage on said real estate, for one and two years after the maturity thereof; and so, in consideration of the appellees' agreement to such extension, the appellants agreed, in and by the written contract in suit, to pay said note. The appellees' agree-

ment to extend the time of the payment of the note, for the payment of which the appellants' real estate was bound by the mortgage thereon, for certain specified periods of time, was certainly a sufficient consideration to sustain and uphold the appellants' agreement or contract to pay the note in suit. It is well settled, we think, by the decisions of this court, that an agreement for an extension of the time of payment, for a definite period of time, is a valuable consideration for an agreement or contract made upon the faith thereof. *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576.

We are clearly of the opinion, that the agreement in suit showed upon its face, that it was executed upon a valuable and sufficient consideration.

The agreement sued upon was an original undertaking by the appellants, whereby they agreed, in consideration of the appellees' extension of the time of payment of the note for one and two years after its maturity, that they, the appellants, would pay said note, in accordance with its tenor and effect, except as modified by said agreement. This was clearly the intent and meaning of the appellants' contract, as we construe it; and we think it is not open to any other construction. They assumed and agreed, as original promisors, to pay the note of Jacob Foltz, for the payment of which their real estate was bound, in consideration of the appellees' agreement to extend the time of payment, and to allow them to pay the note, in two specified instalments, in one and two years after the maturity of the note. This agreement of the appellants was an original, and not a collateral, contract or promise on their part; and when they made default therein, as it is alleged that they did, the appellees had the right to sue at once, and in the first instance, upon said written agreement, and recover of the appellants the amount unpaid of said note, in accordance with the tenor and effect thereof. In such suit, we

Kress et al., Executors, v. The State, ex rel. Wagoner.

think, the proper measure of the amount of the appellees' recovery would be the amount they could have recovered in a direct suit upon the note. *McDill v. Gunn*, 43 Ind. 315; *Josselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113.

We have carefully examined and considered the several questions presented and discussed by the appellants' counsel, in their brief of this cause in this court, and it seems very clear to us, that the circuit court did not err in any of the rulings which the appellants have here assigned as errors.

The judgment is affirmed, at the appellants' costs.

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KRESS ET AL., EXECUTORS, v. THE STATE, EX REL. WAGONER.

LAW OF THE CASE.—The rule of law applied by the Supreme Court in the decision of a case remains the law of that case in all subsequent decisions thereof.

JUSTICE OF THE PEACE.—*Complaint on Bond.*—*Fraud in Rendering Judgment.*

—*Mistake.*—In an action on the bond of a justice of the peace, the complaint alleged, that, in rendering judgment in a cause pending before him, wherein the relator was a party, the justice, without the knowledge or fault of the relator, and with intent to cheat and defraud him, had fraudulently and purposely rendered the judgment for less than he was entitled to recover. *Held*, on demurrer, that the complaint is insufficient.

SAME.—*Judicial Officer not Liable for Judicial Act.*—A judicial officer is not liable pecuniarily for injury resulting from his wrongful rendition of judgment however erroneous, false or fraudulent that judgment may be.

From the Clay Circuit Court.

S. W. Curtis, I. M. Compton and G. A. Knight, for appellants.

W. W. Carter and S. D. Coffey, for appellee.

Kress *et al.*, Executors, *v.* The State, *ex rel.* Wagoner.

BIDDLE, J.—This is the case of *Larr v. The State, ex rel. Wagoner*, 45 Ind. 364, revived by the representatives of Larr.

It is brought on the official bond of Larr, a justice of the peace, alleging the erroneous rendition of a judgment by the justice, in favor of the relator, for sixty-six dollars, when it should have been rendered for one hundred and sixty-six dollars.

We need not set out the original complaint, as it is fully stated in the reported case. After the reversal and the remandment of the case, the complaint was amended by charging that the judgment was so rendered by the justice, fraudulently and purposely, with intent to cheat and defraud the relator. In other respects, the two complaints are the same.

Separate demurrers, by the appellants, were overruled to the complaint.

Answer; jury trial; verdict for appellee; and judgment on the verdict.

The appellants reserved exceptions to the rulings on the demurrers to the complaint, to the instructions of the court, and to the sufficiency of the evidence to sustain the verdict, and appealed.

In the reported case it was directly held, that the judgment of the justice was conclusive, and could not be attacked collaterally, either in a pleading or by evidence. This decision became the law of the case, remains the law of the case still, and will remain the law of the case forever. The amendment of the complaint, averring fraud, can not affect the conclusiveness of the judgment. Besides, judicial officers, as judges of courts and justices of the peace, although they may be impeached for corrupt actions, can not be held pecuniarily responsible to the party injured. This is a fundamental principle in jurisprudence. The appellee furnishes us with a list of authorities, showing many cases wherein

Patterson et al. v. Rowley.

ministerial or executive officers, as sheriffs, constables or clerks, have been held liable for fraud and mistake in the exercise of their duties, but no case wherein a judicial officer, in the exercise of judicial functions, was ever held liable to the party injured, however erroneous, false or fraudulent his judgment might be. A stranger to the record may attack a judgment for fraud in obtaining the judgment—not for fraud in the cause of action—because, not being a party to it, he can not appeal; but in no case can even a stranger attack a judgment for fraud in the judge or justice who rendered it, and much stronger are the reasons against a party to the judgment, who can appeal. *De Armond v. Adams*, 25 Ind. 455. And, as to the conclusiveness of a judgment, when attacked collaterally, either by a party or a stranger, see the following authorities: *Wescott v. Brown*, 13 Ind. 83; *Cassel v. Scott*, 17 Ind. 514; *Evans v. Ashby*, 22 Ind. 15; *Waltz v. Borroway*, 25 Ind. 380; *Dequindre v. Williams*, 31 Ind. 444; *Abdil v. Abdil*, 33 Ind. 460; *Gavin v. Graydon*, 41 Ind. 559; *Bates v. Spooner*, 45 Ind. 489; *Joseph v. Burk*, 46 Ind. 59; *Landers v. George*, 49 Ind. 309; *Hackleman v. Harrison*, 50 Ind. 156; *Pressler v. Turner*, 57 Ind. 56.

The complaint in the present case contains no cause of action.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to sustain the demurrers to the complaint.

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| 65 | 108 |
| 163 | 11 |

PATTERSON ET AL. v. ROWLEY.

SUPREME COURT.—*Appeal after Receiving Payment on Judgment.—Dismissal of.—Specific Performance.—Tender.*—In an action to enforce the specific performance of a contract to convey real estate, wherein, to keep good

Patterson et al. v. Rowley.

his tender thereof, the plaintiff paid into court a certain sum of money for the defendant, the court found, that, to entitle the plaintiff to a decree, he must pay into court, for the defendant, an additional sum, which he did, and obtained his decree. And the defendant having received the aggregate of such sums, less the costs of the action, appealed to the Supreme Court.

Held, that the case falls within section 550, 2 R. S. 1876, p. 238, and that the appeal should therefore be dismissed.

From the Howard Circuit Court.

J. O'Brien, M. Garrigus, M. Bell and M. McDowell, for appellants.

N. P. Richmond and J. C. Denny, for appellee.

Howe, C. J.—On the 11th day of November, 1878, the appellants filed in this court the transcript of the record of this cause, and their assignment of errors thereon.

The appellee appeared and filed his answer to this appeal, in which he alleged, in substance, that, “on the 4th day of April, 1878, the above entitled cause was tried and finally disposed of in the said Howard Circuit Court; that, prior to the commencement of this cause in said court, the appellee tendered to said appellants the sum of three hundred dollars, as the amount due to said appellants, and, at the time of the filing of their complaint, he paid into court, for the use of said appellants, the said sum of \$300; that, on the trial of said cause, the court found that there was due to the said complainants the further sum of \$93, making in all \$393; that he then and there paid into court the further sum of \$93, making in all the sum of \$393; that, on the 12th day of April, 1878, the said appellants received and accepted the said sum of \$393 from the clerk of said court, in full of the amount due to them from the said appellee, and then and there receipted for the same; that afterward, on the 11th day of November, 1878, the said appellants filed the record of this cause in this court; and so this appellee says, that, after the rendition of the judgment in this cause, and before the appeal was taken in this cause, the said appellants received and accepted the

Patterson et al. v. Rowley.

amount found due to him by said court, and in full satisfaction and discharge of all claims and demands against this appellee. Wherefore he prays that the appeal in this cause be dismissed."

To the appellee's answer, the appellants filed in this court their reply, in which "they admit that said cause was tried on the 4th day of April, 1878, and that, prior to the commencement of said suit, the appellee tendered to the appellants \$300, and paid the same into court, and that afterward, and before judgment, the appellee paid into court, for the use of the appellants, the further sum of \$93; appellants further admit, that, on the 12th day of April, 1878, they received from the clerk of said court the sum of \$343, he retaining \$50 on costs, but they deny that said sum was so received or accepted in full satisfaction and discharge of all claims against the appellee. And the appellants aver the facts to be, as shown by the transcript and record in this cause, that no judgment was ever obtained by the appellants against the appellee, in said cause, nor was there any order of the court requiring the appellee to pay any sum of money to the appellants, nor into court, for their use. Appellants aver that said money was so paid to the clerk by the appellee voluntarily, as a tender to the appellants, and as such they accepted it, not in full, but as a payment to that extent of the amount due to them. The only judgment rendered in this cause was in favor of the appellee, against the appellants. Wherefore," etc.

To this reply the appellee demurred, upon the ground that it did not state facts sufficient to constitute a good reply to his plea or answer.

The question presented for our decision, by the pleadings filed in this court, may be thus stated: Conceding the facts stated in the appellants' reply to be true, as they have therein stated them, can they maintain and prosecute

their appeal of this cause, in this court? The last sentence in section 550 of the practice act reads as follows: "The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon." 2 R. S. 1876, p. 238. This sentence was not changed, in any particular, in the act amending said section, approved March 14th, 1877, Acts 1877, Spec. Sess., p. 59. The record shows that the appellee sued the appellants to obtain the specific performance of a written contract or agreement, by and between the parties, providing, *inter alia*, for the conveyance, by the appellants to the appellee, of certain real estate in Howard County, Indiana. The cause was tried by the court, and at the request of the parties the court made a special finding of the facts in the case, and of its conclusions of law thereon. Among its conclusions of law, the court found, that, in addition to the sum of \$300 tendered by the appellee to the appellants, and then in court for their use, "before the plaintiff is entitled to specific performance, he should pay into court the additional sum of \$93; * * * this being done, he is entitled to a judgment for a specific performance of the contract." The record further shows, that the "plaintiff now pays into court, for the use of the defendants, the sum of ninety-three dollars, balance found due to defendants, upon the contract between them, above the amount already paid." It was then adjudged by the court that the appellee was entitled to a specific performance of the contract in suit, and to a conveyance of said real estate, etc.

It is very clear, we think, that the appellee paid into court the said sum of ninety-three dollars, not as a tender to the appellants of that amount of money, but in compliance with the requirements of the court's special finding, conclusions of law and judgment. The appellants received from and receipted to the clerk of the court for the sum of money thus paid by the appellee upon and in accord-

Lent et ux. v. The First National Bank of Napoleon, Ohio.

ance with the judgment of the court; and, having thus received the money thus paid by the appellee on the judgment in question, it seems to us that the case falls fairly within the spirit, meaning and purpose of the statutory provision above quoted, and that the appellants were thereby inhibited from taking and prosecuting an appeal from the said judgment. It is immaterial whether the appellants received the money in full satisfaction of all their claims against the appellee or not; their receipt of any money paid by the appellee on the judgment operated, under the statute, to prevent them from taking an appeal from the judgment to this court.

We are clearly of the opinion, that the facts stated in the reply were not sufficient, under the appellees' demurrer thereto.

The demurrer to the reply is sustained, and the appeal is dismissed, at the costs of the appellants.

LENT ET UX. v. THE FIRST NATIONAL BANK OF NAPOLEON,
OHIO.

SUPREME COURT.—*Removal of Brief.*—Where the brief of an appellant has been removed from the files of the Supreme Court, and, on due and reasonable notice, he fails to return it or file another, the judgment will be affirmed.

From the DeKalb Circuit Court.

J. M. Coombs, J. Morris and R. C. Bell, for appellants.

R. W. McBride and J. L. Morlan, for appellee.

BIDDLE, J.—The transcript in this case was filed January 6th, 1875.

On the 29th of November, 1876, the case was submitted by the appellee. The papers were withdrawn, and re-

Eden *et al.* v. Everson *et al.*

mained from the files until May 12th, 1878, at which time they were returned without the briefs of the parties, which had been previously filed.

On the 15th of May, 1878, the counsel for appellants were informed that their brief was not on file, and were desired to return it to the files, or supply one in its stead.

Up to the present time, May 15th, 1879, no brief has been returned or supplied.

The judgment is therefore affirmed, at the costs of the appellants.

EDEN ET AL. V. EVERSON ET AL.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—*Assignment for Benefit of Creditors.*—*Failure to Record Deed of.*—*Estoppel.*—*Pleading.*—*Parties.*—In a proceeding supplementary to execution, under section 522, 2 R. S. 1876, p. 231, to reach property of the execution debtor alleged to be in the possession of a third person, the latter answered setting up a voluntary assignment to him by the debtor of all his property for the benefit of all his creditors, but the deed of assignment had neither been assented to by the execution creditor, nor had it been recorded.

Held, that the assignment was not binding upon such creditor, even though, after it was made, he had verbally assented thereto.

Held, also, that the statute does not contemplate pleadings in such proceeding, as in ordinary civil actions.

Held, also, that the other creditors were neither necessary nor proper parties to the proceeding.

SAME.—*Affidavit by Attorney.*—The affidavit instituting such proceeding may be made on behalf of the creditor by his attorney.

From the Marion Superior Court.

J. T. Dye, A. C. Harris and F. Knefler, for appellants.

J. M. Judah and A. S. Caldwell, for appellees.

BIDDLE, J.—Proceedings supplementary to execution, founded upon the following section of the code :

VOL. LXV.—8

Eden et al. v. Everson et al.

"SEC. 522. After the issuing or return of an execution against the property of the judgment debtor, or any one of the several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment debtor, or is indebted to him in any amount, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law, such person, corporation, or any member thereof, may be required to appear and answer concerning the same as above provided." 2 R. S. 1876, p. 281.

The affidavit in this case sets out a judgment recovered by George N. Everson and Asahel N. Elliott against Daniel W. Irwin and Robert A. Newell; the issuing of an execution and a return by the sheriff of no property found; that Charlton Eden and Henry W. Hildebrand, who are made defendants, have, and each of them has, property of the judgment debtors amounting to a large sum of money, which, together with other property claimed by the judgment debtors as exempt from execution, exceeds the amount of property exempt by law; praying that the defendant be required to answer, etc. The affidavit is sworn to by John M. Judah, who appears to be the attorney for the appellees.

The appellants appeared and answered, setting up a voluntary assignment made by the judgment debtors to Eden and Hildebrand, as trustees, for the benefit of creditors, and that the trustees had no property in their hands belonging to the judgment debtors except what was included in said assignment, and held for the benefit of creditors, setting out the deed of assignment. The assignment was not consented to by the appellees.

The court found in favor of the appellees, and ordered the payment of the judgment to be made out of the property in the hands of Eden and Hildebrand.

The appellants excepted, prepared their case, and appealed to this court.

It does not appear in this case, that the deed of assignment was ever recorded, or even filed with the recorder of the county to be recorded; and, until it is so filed or recorded, no title to the property assigned passes to the assignees. *New v. Reissner*, 56 Ind. 118; *Forkner v. Shafer*, 56 Ind. 120.

We do not understand the appellants as contesting this point, but they insist:

1. That the petition or affidavit is insufficient to require Eden and Hildebrand to answer. But we do not see wherein they have presented that question by the record. They have not done so either by motion, demurrer or an assignment of error. But it appears to us to be good. The statute does not contemplate pleadings in proceedings supplementary to executions, as in ordinary civil cases. *Coffin v. McClure*, 23 Ind. 356; 1 R. S. 1876, p. 142.

2. The appellants think the affidavit was not made by a "proper person to so do," but they do not show us wherein the affiant was an improper person to make the affidavit. The statute requires no particular person to make the affidavit, and we think the attorney of the judgment creditor is competent for that purpose. See section 522, cited *supra*.

3. It is also insisted by the appellants, that, after the answer was filed, showing the assignment made by the judgment debtors, no further steps should have been taken, until the creditors signing the contract were brought before the court.

Under the statute, the creditors generally were neither necessary nor proper parties. *Butler v. Jaffray*, 12 Ind. 504. The assignment, as to the judgment creditors, was void by statute. As to them, these proceedings would be carried on as if such an assignment had never been made.

4. It is urged, too, that, when the answer disclosed that Eden and Hildebrand held the property in a fidu-

Eden et al. v. Everson et al.

ciary capacity, the validity of the trust could not be enquired into.

But, as the assignment passed no property to the trustees, there was no fiduciary relation as against these claimants. The court did not undertake to enquire into the validity of the trust as between the judgment debtors, and those creditors who agreed to the assignment.

5. It is claimed, also, that the judgment creditors are estopped by their assurance to the trustees in the deed of assignment, that they would never trouble them.

There is some evidence tending to show such a state of facts, but there is also evidence contradicting it. Besides, it is not clear to us how any verbal promise the judgment creditors could make, after the assignment was executed, unless upon some new consideration, could prevent them from asserting their claim. But it is clear that the finding of the court is not contrary to the evidence on this point.

6. The appellants also complain that the judgment is personal against Eden and Hildebrand, that they shall pay the money into court for the benefit of the creditors, and not against them as trustees.

No objection was pointed out to the form of the judgment at the time. Besides, Eden and Hildebrand were not trustees as to the creditors making this claim. The court found that Eden and Hildebrand, as individuals, not as trustees, had moneys, property and effects in their hands belonging to the judgment debtors, out of which these judgment creditors ought to be paid, and made the order accordingly. There is no error in this. The law and the facts sustain the judgment, which is affirmed, at the costs of the appellants.

Compton v. Jones *et al.*

COMPTON v. JONES ET AL.

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PROMISSORY NOTE.—Mortgage.—Action by Endorsee.—Counter-Claim by Payee Claiming Title.—Verdict.—Uncertainty.—Venire De Novo.—In an action on a promissory note and to foreclose a mortgage securing it, brought by an endorsee against the mortgagors and a junior mortgagee, the payee of the note, on his own petition, was made a party, and filed a counter-claim alleging ownership of the note; and, judgment having been rendered, by agreement of parties, in favor of the junior mortgagee, against the mortgagors, before verdict, the jury returned a verdict that the senior note and mortgage were the property of the payee, assessing his damages and finding that he was entitled to foreclosure.

Held, on motion by the plaintiff for a *venire de novo*, that the verdict is certain as to him, and that he can not complain of its uncertainty as to others.

SAME.—Assignment of Note as Indemnity.—Payment of Debt by Assignor.—Rescission.—The evidence on the trial in such action established, that the note in question had been endorsed by the payee to the plaintiff, simply to secure him against loss on account of debts of the payee which the plaintiff was assisting him to pay off, but that, before the commencement of the action, the payee had paid the same out of his own means.

Held, that, on such payment, the assignment was rescinded, and the note and mortgage reverted to the payee.

From the Grant Circuit Court.

G. T. B. Carr and *J. H. Compton*, for appellant.

I. VanDevanter and *J. W. Lacey*, for appellees.

BIDDLE, J.—Joseph D. Compton brought this suit against Susanna Jones, William R. Jones, Elijah Sailors and George W. Ammons.

The complaint is founded on a promissory note, made by Susanna Jones and William R. Jones, payable to Isaac DeCoursey, and assigned by DeCoursey to Compton.

The note is secured by a mortgage, executed by the Joneses. Sailors and Ammon were junior mortgagees. They answer, setting up their mortgage, and pray judgment against the Joneses.

Isaac DeCoursey is made a party defendant, on petition, and files a special paragraph of answer, and a counter-

Compton v. Jones et al.

claim, averring that he is the owner of the note and mortgage claimed by Compton and described in the complaint, notwithstanding the assignment, and praying a judgment in his favor against the Joneses, and a foreclosure of the mortgage.

It appears by the record, that the parties went to trial before a jury, without any reply to the special paragraphs of answer, and without any answer to the counter-claim. The affirmative pleadings, therefore, must be held as denied. But no question is made upon the condition of the issues.

Before the return of the verdict, judgment was entered, by agreement, in favor of Ammons, against the Joneses, on the junior note and mortgage. The jury then returned a verdict upon the issue between DeCourcey and Compton, as to which of them owned the note and mortgage described in the complaint, in favor of DeCourcey, and against the Joneses, and assessed the amount due to DeCourcey on the senior note and mortgage.

Compton moved for a *venire de novo*; his motion was overruled, and he excepted.

Over a motion for a new trial, made by Compton, and exceptions, he reserved three questions for our consideration. The court rendered judgment on the verdict, for the amount due on the note, and that the mortgage be foreclosed. Compton appealed to this court.

1. The first assignment of error, which appellant insists upon, is, overruling his motion for a *venire de novo*. He thinks the verdict is defective and uncertain, in not finding on all the issues presented in the pleadings.

The form of the verdict is as follows :

“ We, the jury, find for the defendant Isaac DeCourcey, that said note and mortgage are his property, and assess his damages at \$125.40, and that he have foreclosure of the mortgage.”

It is very clear, that this verdict is neither defective nor uncertain, as to the issue between Compton and DeCourcey, and that is the only issue of which Compton can complain. Whatever may be the defects in the verdict as to other parties, they do not complain; and, if a verdict is sufficient as to one of several parties, he can not complain because it is imperfect as to other parties. This point is decided in the case of *Whitworth v. Ballard*, 56 Ind. 279. We think the appellant was not entitled to his *venire de novo*.

2. That the verdict is not sustained by sufficient evidence.

The plaintiff insists, that, as the assignment of the note and mortgage by DeCourcey to Compton is not disputed, there should have been proof of a rescission of the assignment. There should have been such proof, doubtless, or proof of the right to a rescission before suit was brought, and we think there was proof of the latter proposition. It appears that the assignment of the note and mortgage was made by DeCourcey to Compton for the purpose of securing Compton for assisting DeCourcey in paying certain of his debts, and not as a sale. These debts were afterwards paid by DeCourcey, and out of his property, and not by Compton. After these debts were so paid, Compton had no further right in the note and mortgage. In fact, the assignment was then rescinded, all except the mere redelivery of the note and mortgage to DeCourcey by Compton. This state of facts, which we think the evidence fairly proves, is sufficient to sustain the verdict.

3. That the verdict is contrary to law.

The appellant uses the same argument in support of this proposition as that which he used in support of his second point; and we think, under that head, it has already been sufficiently answered. We can not discover wherein the verdict is contrary to law.

Whisnand, Administrator, *et al.* v. Small *et al.*

The judgment is affirmed, at the costs of the appellant.

The appellant, having died after the submission of this cause and before its decision, the judgment is rendered as of the date of the submission.

WHISNAND, ADMINISTRATOR, ET AL. v. SMALL ET AL.

DECEDENTS' ESTATES.—*Petition by Creditor for Sale of Land to Pay Debts.*—

The petition of a creditor of a decedent's estate, under section 78, 2 R. S. 1876, p. 523, for the sale of the decedent's real estate to pay debts, need not aver that the administrator has refused to act in the matter.

SAME.—*Sale to be made by Administrator.*—The sale in such case, if ordered, must be made by the administrator and not by the creditor.

SAME.—*Administrator may Redeem from Sale on Foreclosure.*—Real estate sold on foreclosure against the heirs of a decedent may be redeemed by the administrator, even though he was not a party to the foreclosure.

SAME.—*Abandonment of Title by Compromise.—Tax Deed.—Sheriff's Deed.—Answers to Interrogatories.*—On a petition by a creditor of an insolvent decedent's estate, under said section 78, one of the defendants was a creditor who claimed title to the real estate in question under a tax deed, a sheriff's deed on foreclosure of a mortgage executed by the decedent, and also under a decree rendered in an action by him against the administrator, heirs and certain creditors of the decedent, to quiet title based on such sheriff's deed and tax deed, to which action the petitioning creditor was not a party. On the trial of the petition the jury, with their general verdict for the petitioner, found specially that the administrator had paid into the clerk's office the sum necessary to redeem from such sheriff's sale; that, after the year of redemption, the action to quiet title was brought, and, by agreement, the administrator withdrew the redemption money, the plaintiffs therein paid him a certain sum for the other creditors, the tax deed, sheriff's deed and all debts due the plaintiff from the estate were declared satisfied, and the title to the real estate in question was quieted in the plaintiff; and a decree reciting such agreement was entered accordingly.

Held, that the plaintiffs, by such compromise, abandoned their title under such deeds and rested the same on the decree.

Held, also, that such decree did not bind the petitioner.

Whisnand, Administrator, *et al.* v. Small *et al.*

Held, also, that the answers to interrogatories supported the verdict.

SAME.—*Sale in solido.*—*Land Susceptible of Division.*—A sheriff's sale *in solido* of lands susceptible of sale in parcels can not ordinarily be upheld.

From the Monroe Circuit Court.

C. F. McNutt, B. E. Rhoades, J. W. Buskirk, H. C. Duncan, S. H. Buskirk and J. W. Nichol, for appellants.

J. H. Loudon, M. F. Dunn and F. Wilson, for appellees.

BIDDLE, J.—Petition by the appellees, as creditors of the estate of Frederick F. Butler, deceased, under section 78 of the decedents act, 2 R. S. 1876, p. 523, to sell real estate.

This section provides, that "Any creditor, upon filing a petition therefor, verified by his affidavit, setting forth the amount of the personal estate, the insufficiency of such personal estate to pay the debts outstanding, a description of the real estate of the decedent, the names and ages of the heirs and legatees, if they are known, and, if not known, so stating, may have an order for the sale of such real estate by such executor or administrator, under the same regulations as hereinbefore provided in case of an application to sell real estate by an executor or administrator."

The administrator, the widow and heirs were made defendants to the petition, and also William A. Gabe and Martha A. Buskirk, who claimed some interest in the land. The widow disclaimed, and the heirs were defaulted. The administrator, Gabe and Martha A. Buskirk demurred to the petition for want of sufficient facts; their demurrer was overruled, and exceptions reserved. They then filed an answer of five paragraphs, to which demurrers were overruled, and the appellees excepted. A reply in several paragraphs was filed, rulings upon demurrers to them had, and issues of facts joined. A trial by jury, and a general verdict returned in favor of the appellees. Besides the general verdict, the jury found certain facts, in answer to special interrogatories, which, in a narrative form, may be stated as follows:

That the appellees are creditors of the estate of Butler,

Whisnand, Administrator, *et al.* v. Small *et al.*

deceased; that he left personal assets of the value of one thousand nine hundred and thirty-eight dollars and sixty-four cents; that he died the owner of the real estate in controversy, describing it; that he left no other real estate, except what was partitioned to the widow; that the value of the real estate in controversy, in November, 1873, was eight thousand dollars; that its present value is eight thousand dollars; that the amount of legal claims against the estate is eight thousand six hundred and twenty-nine dollars and four cents; that the defendants alleged to be heirs in the petition, naming them, are the only heirs of said Frederick F. Butler, deceased; that John C. Whisnand, as administrator of the estate of Butler, paid to the clerk, for the use of George A. Buskirk and William A. Gabe, the sum of one thousand and six dollars, for the purpose of redeeming said real estate from a sheriff's sale, sold on an order of sale in the case of a judgment in favor of Jonathan Hinkle, against the heirs of said Butler, which said property was purchased by said Buskirk and Gabe; that said sale took place January 6th, 1872; that said administrator paid said redemption money to the clerk December 24th, 1872; that it was withdrawn November, 1873; that it was not so withdrawn against the consent of any of the creditors; that, to the question, "Did any of the creditors assent to the compromise and withdrawal of the redemption money?" the answer was, "Yes;" that Gabe, Buskirk and the administrator were aware of the condition of Butler's estate as to solvency, and of paying the money to the clerk to redeem the land from said sale; that said real estate was divisible into two or more parcels without damage to the owner, so as to be sold in parcels instead of the whole; that the reasonable value of each parcel was as follows: the corner brick four thousand dollars, post-office building two thousand seven hundred dollars, meat store eight hundred dollars, and the dwelling on Sixth

Whisnand, Administrator, *et al.* v. Small *et al.*

street one thousand five hundred dollars; that the amount of the debts due to Buskirk and Gabe, from the estate of Butler, and settled by the compromise of November, 1873, was five thousand five hundred and thirty-eight dollars and sixty-five cents; that the amount of taxes on said property, paid by Buskirk and Gabe, was seven hundred and forty-six dollars and thirty cents; that the amount of the Hinkle judgment was one thousand and six dollars; that the amount due on the Vawter judgment, at the time of the compromise, was one thousand two hundred and eighty-six dollars and thirty-five cents; that Buskirk and Gabe paid the administrator in money, on the compromise, for the creditors of Butler's estate, two thousand five hundred dollars; that the compromise of November, 1873, was made in good faith by the administrator of Butler's estate, but it was a fraud as to creditors.

A motion for a new trial, and also in arrest of judgment, were overruled, and exceptions reserved.

Decree, ordering the sale of the real estate to pay the claims of appellees, as creditors of the estate of Butler.

The appellants discuss the following questions: While they admit that the petition "contains all the requisite averments of a petition of an administrator for the sale of real estate to pay debts, in addition to the averments which are directed solely against Buskirk and Gabe," yet they insist that it is insufficient, because it does not contain an additional averment that the administrator failed or refused to act in the matter. They think this averment is necessary to give the creditor the right to file the petition.

The statute does not seem to us to require such an averment. The sale is not to be made by the creditor, but by the executor or administrator, under the same regulations as if the executor or administrator had applied. We can not see the necessity for any more averments in a petition

Whisnand, Administrator, *et al.* v. Small *et al.*

by a creditor, than in one by an executor or administrator, where the sale must be made in the same manner, and by the same person, in both instances. We think the petition is sufficient. This reasoning also disposes of the motion in arrest of judgment, which was properly overruled.

The appellants also moved for judgment in their favor, on the special findings, notwithstanding the general verdict, because they are inconsistent therewith; but we can see no such inconsistency. On the contrary, it seems to us that they support the general verdict in every particular.

But the appellants base their claim of ownership of the property in dispute upon three grounds :

1. That they had purchased said property at a tax sale for seven hundred and forty-six dollars and thirty cents, and had received a deed therefor;

2. That, prior to the death of Butler, he had mortgaged the property in dispute to Jonathan Hinkle, who had, subsequently to the death of Butler, obtained a foreclosure of the mortgage; that, at the sale under the decree, Buskirk and Gabe had purchased the property, and received a certificate of purchase, and subsequently a deed from the sheriff for the same;

3. That Buskirk and Gabe are the owners of the property by virtue of the compromise of a suit pending in the Monroe Circuit Court, which compromise had been confirmed by a decree of the court rendered thereon.

These defences were all put in issue by the pleadings,—which excused us from stating them any more particularly in the premises of the case,—and tried by the jury.

We will notice the appellants' title to the property by the compromise and decree first, as we think it materially affects the title by the tax deed, and by the sheriff's sale also.

After the purchase of the property by Buskirk and Gabe at the tax sale, and also at the sheriff's sale, and while the money paid to the clerk by the administrator within the year to redeem the land from the sheriff's sale, remained in the hands of the clerk, and after the year had expired, Buskirk and Gabe brought their action to quiet their title to the land, making the administrator, Lawson E. McKinney, Milton J. Smith, and Thomas Mullikin, creditors of the estate, defendants thereto. This action was compromised by the parties substantially on the following basis :

1. The plaintiffs to have the property in controversy decreed to them, with the rents and profits, etc. ;

2. Liens held on the land by plaintiffs, whether for taxes or on judgments, to be deemed satisfied, and no further claim to be made for the same against the estate of Butler ;

3. The claims of Buskirk, which were not liens, were also to be deemed satisfied, and no further claim to be made therefor against the estate of Butler, whether held by assignment or otherwise ;

4. The plaintiffs to pay the administrator, on or before the 25th day of December, 1873, two thousand five hundred dollars, for which they executed their notes ;

5. The administrator to be allowed to withdraw the money from the clerk's office, there deposited by him to redeem the property in controversy from the sheriff's sale, the entry thereof by the clerk to be set aside and held for naught, and the costs to be paid by Butler's estate,—all of which was amicably decreed by the court.

We can not see what claim of title to the property in dispute the appellants can have under their tax deed, after they had released by the compromise the amount of taxes they had paid at the tax sale. Besides, there is no evidence in the record supporting the regularity of the tax

Whisnand, Administrator, et al. v. Small et al.

sale, nor the validity of the tax deed. For these reasons we think their claim of title under their tax deed is invalid. And we think that the compromise, made while the redemption money was in the hands of the clerk, by releasing valid claims against the estate of Butler, and paying a large additional sum to the administrator, besides the money in the hands of the clerk, was an abandonment of all title under the purchase at sheriff's sale, and rendered the sale null and void.

But the appellants claim that the administrator, not being a party to the judgment on which the sale was made, had no right to redeem the land. We do not see the question in that light. The language of the statute is, that any owner of the land, his heirs, executors or administrators, etc., may redeem the land at any time within one year from the date of the sale. 2 R. S. 1876, p. 220.

This leaves the title of the appellants to rest on the compromise decree. How far this decree may be valid in favor of Buskirk and Gabe, against the administrator, the heirs, and the creditors of Butler's estate, who were made parties to it, we are not called upon to decide; but it seems to us that it constitutes no defence against the claims of the appellees, who are creditors of the estate of Butler, and were not parties to the compromise. An administrator and the heirs can not make any arrangement with a portion of the creditors of the estate, by which the assets can be diverted as to the shares of other creditors who are not parties to the arrangement, or by which the parties can be bound.

Upon this view of the case, whether the sheriff's sale could have been maintained if it had not been abandoned and annulled by the compromise, is a question we need not decide. The sheriff's return of the sale, which is set up in the answer of the appellants, informs us that he sold the whole of the property together; the finding of the

Whisnand, Administrator, et al. v. Small et al.

jury shows us that the property was susceptible of division into parcels without injury to its value, and that either one of two of the parcels was abundantly sufficient to pay the decree. Such a sale does not commend itself to a court; especially when property found by the jury to be worth eight thousand dollars was sold on a bid of nine hundred and sixteen dollars as in the present case. Perhaps the sale would have been void for this reason. See the authorities cited at the foot of this opinion. Nor are we called upon to decide whether the compromise was fraudulent as to creditors not parties to it. It is sufficient for this case that it does not bind the appellees, whether fraudulent or fair, as they were not parties to its terms.

We do not decide upon the various rulings presented in the record upon demurrers to the several paragraphs of reply, nor upon questions of evidence, nor upon the instructions given and refused by the court in reference to the several paragraphs of reply, further than to say we see no error in them, because the appellants had the whole benefit of their defence under their answer, without its contradiction or avoidance by the reply; and the jury have found, on sufficient evidence, we think, that it was not established. Thus, upon the whole record, it appears that the judgment is right, even though there might have been intervening error. In such cases the judgment can not be reversed.

The following authorities will support the various propositions approved in this opinion: *Reed v. Carter*, 3 Blackf. 376; *Spahr v. Hollingshead*, 8 Blackf. 415; *Doe v. Collins*, 1 Ind. 24; *Gavin v. Shuman*, 23 Ind. 32; *Wilson v. Lemon*, 23 Ind. 438; *Lashley v. Cassell*, 23 Ind. 600; *Callett v. Gilbert*, 23 Ind. 614; *De Armond v. Adams*, 25 Ind. 455; *Goodrich v. Friedersdorff*, 27 Ind. 308; *Tyler v. Wilkerson*, 27 Ind. 450; *McEntire v. Brown*, 28 Ind. 347; *Holmes v. Bybee*, 34 Ind. 262; *Adkins v. Nicholson*, 39 Ind. 535; *Voss v. Johnson*, 41 Ind. 19; *Davis v. Langsdale*, 41 Ind. 399; *Gavin v. Graydon*, 41 Ind. 559; *Bardeus v. Huber*, 45 Ind.

The Logansport, Crawfordsville and South-Western R. W. Co. v. Braden.

235; *Hughart v. Lenburg*, 45 Ind. 498; *Harbaugh v. Hohn*, 52 Ind. 243; *Gossard v. Ferguson*, 54 Ind. 519; *Spath v. Hankins*, 55 Ind. 155; *Ward v. Montgomery*, 57 Ind. 276; *Goddard v. Renner*, 57 Ind. 532; *Bardeus v. Huber*, 60 Ind. 132.

The judgment is affirmed, at the costs of the appellants.

Petition for a rehearing overruled.

COLLIER v. WAUGH ET AL.

From the Boone Circuit Court.

W. B. Walls, for appellant.

Howe, C. J.—The questions for decision in this case are substantially the same as those which are considered and decided by this court, in the case of *Collier v. Waugh*, 64 Ind. 456.

Upon the authority of the case cited, the judgment in this case is affirmed, at the appellant's costs.

THE LOGANSPORT, CRAWFORDSVILLE AND SOUTH-WESTERN R.
W. Co. v. BRADEN.

From the Montgomery Circuit Court.

R. B. F. Peirce, for appellant.

L. Wallace and *G. D. Hurley*, for appellee.

BIDDLE, J.—Suit commenced before a justice of the peace, on a promissory note; appeal to the circuit court; trial; finding, and judgment for the appellee, who was plaintiff below. Attachment proceedings accompanied the main action.

The sole question made in the case is upon the sufficiency of the evidence to sustain the finding upon the attachment.

With evidence in the record tending to support all the points necessary to sustain a finding, as in this case, it must appear to us clearly that injustice has been done to the complaining party, or we can not reverse the judgment. Although the evidence, as to some points, is weak, under the rule governing our appellate court, we can not say that the finding is wrong.

The judgment is affirmed, at the costs of the appellant.

END OF NOVEMBER TERM, 1878.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1879, IN THE
SIXTY-THIRD YEAR OF THE STATE.

WILLIAMS ET AL. v. HALL ET AL.

RAILROAD.—*Appropriation to.*—*Petition.*—*Notice.*—A petition to a board of commissioners to make an appropriation of money, by taxation of a certain township, to aid in the construction of a railroad, and also the notice of election, specified a certain sum, "or a sum equal to two per centum of all taxable property in said township," as the appropriation desired.

Held, that the amount of the appropriation is set out with sufficient certainty.

SAME.—*Harmless Evidence.*—*Unassessed Property.*—On the trial of an action by a tax-payer to enjoin the collection of such tax, it appearing that the sum specified was exactly two per centum of the assessed taxable property of the township, it was harmless to allow evidence by the defendant of unassessed property subject to taxation in that township.

SAME.—*Cases Distinguished.*—*The Cincinnati, etc., R. R. Co. v. Wells*, 39 Ind. 539, and *The Detroit, etc., R. R. Co. v. Bearss*, 39 Ind. 598, distinguished.

BIDDLE, J., dissented, denying the constitutionality of the law authorizing such appropriations.

From the Hamilton Circuit Court.

Vol. LXV.—9

Williams et al. v. Hall et al.

D. Moss, for appellants.

S. Claypool, *H. C. Newcomb* and *W. A. Ketcham*, for appellees.

WORDEN, C. J.—This was an action by the appellants, who were tax-payers of Noblesville Township, of Hamilton county, against the appellees, who were the auditor, treasurer and board of commissioners of the county, the object of which was to enjoin the collection of a certain tax levied upon the property of the township, to aid the Anderson, Lebanon and St. Louis Railroad Company, in the construction of its road running through that township.

Issue was joined, and the cause was tried by the court, resulting in a finding and judgment for the defendants.

There are but two points made in the cause by counsel for the appellants, on which a reversal is asked, one of which relates to the sufficiency of the petition to the board of commissioners, and the notice given to the voters for taking the vote of the township on the subject of the appropriation; and the other point relates to the admission of certain evidence offered by the defendants.

The language of the petition, so far as the amount sought to be appropriated is concerned, is as follows:

"We, the undersigned citizens," etc., "petition your honorable board, and represent that we desire said township to raise, by taxation and appropriation, the sum of twenty-eight thousand five hundred dollars, or a sum equal to two per centum of all taxable property in said township," etc.

The same alternative language, as to amount, is carried into the notice given of the election.

It is claimed by the appellants, that this uncertainty as to amount renders the whole proceedings void.

The statute provides that the petition shall specify the amount sought to be appropriated, but the amount can not exceed two per centum upon the amount of the taxable

property of such township on the tax duplicate of the county for the preceding year. The amount must also be specified in the notice to be given of the election. 1 R. S. 1876, p. 736, secs. 1 and 3.

In the case of *The Cincinnati, etc., R. R. Co. v. Wells*, 39 Ind. 539, the petition specified, as to amount to be appropriated, "one and three-quarters per centum upon all the taxable property;" and, in the case of *The Detroit, etc., R. R. Co. v. Bearss*, 39 Ind. 598, the petition specified "two per cent. upon the taxables of said township." In both these cases, the petitions were held insufficient, and the proceedings under them void. But it may be observed that in them no amount whatever was specified, and we think they are clearly distinguishable from the present case. Here the petitioners specified the amount of twenty-eight thousand five hundred dollars, as the sum they desired to have appropriated. The fair meaning of the petition was, that the petitioners desired an appropriation of only the sum mentioned, though it might fall short of the two per centum provided for by the statute; but, if it should exceed the amount of the two per centum, then they desired only the amount of the two per centum. This, it seems to us, was a substantial compliance with the statute. No one could have been misled by the petition or notice, nor could any one have voted under any misapprehension of the amount of the appropriation asked for. The petition and notice were sufficient.

We pass to the other question.

The appropriation made was twenty-eight thousand two hundred and thirty dollars and thirty cents, to be collected in two several years.

The amount was exactly two per centum on the amount of the taxable property of the township, on the tax duplicate of the preceding year.

The amount of taxables, upon which the per centum was calculated, did not include any of the property of the In-

Foresman, Treasurer, v. Johnson, Auditor.

dianapolis, Peru and Chicago Railroad Company, in the county, amounting to one hundred and five thousand dollars, no part of which was on the duplicate of the property of the township. The defendants proved, over the objection of the plaintiffs, that the portion of this railroad property belonging to the township was thirty-five thousand dollars. This evidence did the plaintiffs no possible harm, because this railroad property did not form any part of the basis on which the per centum was calculated.

There is no error in the record.

The judgment below is affirmed, with costs.

BIDDLE, J., dissents. He denies the constitutional power to levy the tax, and for his reasons cites his dissenting opinion in *Petty v. Myers*, 49 Ind. 8.

FORESMAN, TREASURER, v. JOHNSON, AUDITOR.

FEES AND SALARIES.—*County Treasurer.*—*Compensation for Collecting Delinquent Taxes.*—*Statutes Construed.*—Construing section 14 of the fee and salary act of March 12th, 1875, 1 R. S. 1876, p. 471, and sections 152 and 155 of the assessment act of December 21st, 1872, 1 R. S. 1876, p. 111, together, a county treasurer is entitled to receive and retain, out of *all* delinquent taxes collected by him, a commission of five per cent. on amounts voluntarily paid, and six per cent. on amounts paid after levy, regardless of the time in the year when such collections are made.

SAME.—*Cases Distinguished.*—*The Board of Comm'rs, etc., v. Miles*, 21 Ind. 438, and *Wells v. Shoemaker*, 39 Ind. 115, distinguished.

From the Tippecanoe Circuit Court.

J. M. LaRue and *F. B. Everett*, for appellant.

H. W. Chase, *F. S. Chase* and *F. W. Chase*, for appellee.

NIBLACK, J.—This was a case under the provisions of section 386 of the code, 2 R. S. 1876, p. 190, submitted upon an agreed statement of the facts, signed by the parties respectively, as follows :

Foresman, Treasurer, v. Johnson, Auditor.

“Said Bennett Foresman is the duly elected, qualified and acting treasurer of Tippecanoe county, Indiana, and has been such treasurer for more than one year last past; that the said Cyrenius Johnson is the duly elected, qualified and acting auditor of said county, and has been for more than five months last past; that, on the 15th day of December, 1878, the said plaintiff, as such treasurer, received from the defendant, said auditor, the tax duplicate for the year 1878, of said county; that the whole amount of taxes upon said duplicate, which the plaintiff was thereby required to collect, was three hundred and seventy-one thousand dollars and upwards; that, of this amount, one hundred and fifty-two thousand dollars, and upwards, were for delinquent taxes, assessed against persons who had failed to pay the April instalment for the year 1878, due on taxes of the year 1877 and previous years, which said delinquent taxes were carried forward against the proper persons and their property, in separate columns provided for that purpose on said duplicate; that, from the time of the receipt of said duplicate by said plaintiff, on the 15th day of December, 1878, as aforesaid, to the third Monday in April, 1879, the plaintiff, as such treasurer, collected from the proper persons, of said delinquent taxes, the sum of twenty thousand dollars and upwards, belonging to said county.

“The parties further agree, that they are now engaged in making the settlement required by law to be made between the plaintiff, as such treasurer, and the defendant, as such auditor, under the provisions of the 180th section of ‘An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon,’ as amended by the act of March, 1877, in the Acts of the Regular Session of 1877, at page 142, and it is necessary for said settlement to be completed on or before the 19th day of May, 1879.

“The parties further agree, that the said Bennett Fores-

Foresman, Treasurer, v. Johnson, Auditor.

man, as such treasurer, claims and insists, in said settlement, that he is entitled to retain from the said delinquent taxes of twenty thousand dollars and upwards, so belonging to said county of Tippecanoe, five per centum, making in all one thousand dollars and upwards, and that said defendant, as such auditor, denies the right of said plaintiff to retain from said delinquent taxes, of twenty thousand dollars and upwards, to exceed the amount of allowance by law for the collection of current taxes, which are not and never have been delinquent, which allowance can not exceed one per centum upon such collections.

“The parties further agree, that the claim of the plaintiff of his legal right, as such treasurer, to retain said five per centum on said delinquent taxes collected as aforesaid, and the denial of said right by the defendant, is a matter in controversy between the parties, and that the same shall be submitted to the circuit court of said county for its decision upon this agreed statement of facts, and that the court shall render such judgment upon these facts as could be rendered in any legal proceeding that might be instituted by either party for the adjudication of the rights of the parties, and their duties as such officers as aforesaid, in the premises, whether such proceedings were instituted upon an application for mandate, or for any other remedy authorized by the laws of the State of Indiana.”

This agreed statement of facts was accompanied by the affidavit of both parties, stating that the controversy was real, and that the proceedings were in good faith, to determine the rights of the parties to such controversy.

Upon the facts, as above presented, the court held, as a conclusion of law, that the plaintiff, as such treasurer, was not entitled to receive any greater compensation for collecting delinquent taxes between the 15th day of December, 1878, and the third Monday in April, 1879, than is allowed by law for the collection of current taxes during

Foresman, Treasurer, v. Johnson, Auditor.

that period, which is one per centum, as above stated, to which conclusion of law the plaintiff at the time excepted. Judgment was thereupon rendered for the defendant, from which the plaintiff has appealed to this court.

Under the old law for the assessment of property and the collection of taxes thereon, as it stood prior to the passage of the act of December 21st, 1872, it was the duty of the county treasurer to receive from the county auditor the tax duplicate, which contained the current taxes and also the delinquent taxes of the preceding years, whenever presented to him, between the first Monday in June and the 15th day of October, in each year. Such treasurer was required to devote one month after his reception of the duplicate to visiting at stated times the several townships of the county. After the expiration of such month, he had to remain in his office for the collection of such taxes, current as well as delinquent, until the third Monday in March of the next year, when it was his duty to settle with the auditor for all taxes collected by him up to that date. The treasurer was then required, immediately after his annual settlement with the Auditor of State, which followed soon after his settlement with the county auditor, either in person or by deputy, to call upon every delinquent tax-payer in his county, and, if necessary, to distrain property for the collection of taxes shown to be delinquent upon his settlement with the county auditor, together with penalty and interest thereon. For making "such collections," the treasurer was allowed five, afterward eight, per centum, in just proportion out of each fund collected, and, in addition, constable's fees and mileage. 1 G. & H. 97, 98.

In the cases of *The Board of Commissioners of Grant County v. Miles*, 21 Ind. 488, and of *Wells v. Shoemaker*, 39 Ind. 115, it was held by this court, that, under the foregoing provisions of the old law, a county treasurer was

Foresman, Treasurer, v. Johnson, Auditor.

only entitled to receive the same compensation for collecting delinquent taxes carried forward upon the duplicate after the duplicate was regularly placed in his hands, until the third Monday in March following, which was allowed him for collecting current taxes during the same period, and that it was only for delinquent taxes collected after the third Monday of March, for the collection of which he was required to make an extraordinary effort, that he was permitted to charge a commission of five, afterward eight, per centum, in addition to constable's fees and mileage.

By the act of December 21st, 1872, 1 R. S. 1876, p. 72, above referred to, it is provided, that "The county treasurer shall receive from the county auditor the duplicate of taxes whenever presented between the first Monday in June and the fifteenth day of December;" and "In case any person shall refuse or neglect to pay the tax imposed on him, the county treasurer shall, after the third Monday of April, levy the same, together with ten per centum damages, and the costs and charges that may accrue, by distress and sale of the goods and chattels of such person who ought to pay the same, whenever the same may be found within the county: Provided, that the county treasurer shall at all times have power to levy and collect [delinquent] or other than a current year's taxes; and it is hereby made such treasurer's duty to levy and collect such delinquent taxes, whether they be charged upon a current year's duplicate or otherwise, as well before as after his return and settlement for a current year's taxes." Secs. 152, 155, p. 111.

The act of March 12th, 1875, fixing the fees and salaries of certain officers, provides, amongst other things, that county treasurers shall receive an annual compensation of one thousand dollars each, in quarterly instalments, in March, June, September and December, and that such "County treasurers shall also charge and receive, as a fur-

ther compensation, at the rate of one per centum on the first one hundred thousand dollars of taxes by them collected; and on all sums collected in excess thereof, one-half of one per centum, to be paid as provided in section thirteen. They shall also receive and retain out of all delinquent taxes collected, five (5) per centum, when paid voluntarily, and without levy, and six per centum if paid after levy; and the treasurer shall be allowed the same fees and charges for making distress and sale of goods, and chattels for the payment of taxes, as may be allowed by law to constables for making levy and sale of property on execution." See sections 13 and 14, 1 R. S. 1876, p. 471.

It will thus be seen that the act of December 21st, 1872, *supra*, makes it the duty of the county treasurer to levy and collect delinquent taxes at all times during the year, and that, by the act of March 12th, 1875, *supra*, he is allowed five per centum for collecting all delinquent taxes when paid voluntarily, and without levy, and six per centum if paid after levy.

We think the construction given to the old law, as regards the compensation of county treasurers for collecting delinquent taxes, by the cases of *The Board of Commissioners of Grant County v. Miles*, and *Wells v. Shoemaker*, above alluded to, is not applicable to so much of the two last named acts as relates to such compensation, but that, under said acts, when fairly construed together, such county treasurers are entitled to receive and retain, out of all delinquent taxes collected by them, a commission of five per centum when paid voluntarily, or six per centum after levy, whether collected between the 15th day of December and the third Monday in April, or at any other time during the year.

With these views, we are necessarily constrained to hold that the court below erred in its conclusions of law drawn from the agreed statement of facts submitted to it as

Franklin Life Ins. Co. of Indianapolis v. Cardwell et al.

above set forth, and that, for that reason, the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

FRANKLIN LIFE INS. CO. OF INDIANAPOLIS v. CARDWELL ET AL.

PROMISSORY NOTE.—*Answer of Failure of Consideration.—Life Insurance.*—

In an action by a life insurance company, as payee, against the makers, a principal and surety, on a promissory note, the defendants answered that the note in suit had been executed "in consideration of a valid paid-up life policy, to be issued and delivered to the" principal, "by the plaintiff, and for no other or different consideration whatever; that, although a reasonable time for the issuing and delivering of said policy * has long since elapsed, yet the plaintiff has wholly neglected and refused to execute and deliver * a valid life policy for the value of said note."

Held, on demurrer, that the answer, as a plea of either a partial or total failure of consideration, is insufficient.

From the Hamilton Circuit Court.

J. W. Evans, R. R. Stephenson, A. G. Porter, W. P. Fishback and G. T. Porter, for appellant.

T. J. Kune and T. P. Davis, for appellees.

Howk, J.—This was a suit by the appellant, against the appellees, upon a promissory note, of which the following is a copy:

"\$588.08.

NOBLESVILLE, Ind., Nov. 5th, '73.

"Two years after date, we jointly and severally promise to pay to the order of The Franklin Life Ins. Co. of Indianapolis, at the Citizens Bank of Noblesville, Ind., five hundred and thirty-eight $\frac{28}{100}$ dollars, with ten per cent. interest from maturity and reasonable attorney's fees if suit be instituted on this note, value received, without any relief whatever from valuation or appraisement laws.

Franklin Life Ins. Co. of Indianapolis v. Cardwell *et al.*

the drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

(Signed,) PETER CARDWELL,
“PLEASANT BURRIS.
“J. E. HAWORTH.”

On said note a memorandum was endorsed, in the words and figures following, to wit:

“\$374.91 of the within note to draw interest from date, as per rate within named, and \$163.17 to commence drawing from date of next renewal, which will be August 8th, '74.
(Signed,) T. M. MURPHY.”

It was alleged in the appellant's complaint, that thirty dollars would be a reasonable attorney's fee for collecting said note, and that the note, interest and attorney's fee were due and unpaid. Wherefore, etc.

The appellees jointly answered in two paragraphs; to the second of which paragraphs the appellant demurred, for the alleged insufficiency of the facts therein to constitute a defence to its action. This demurrer was overruled by the court, and to this ruling the appellant excepted, and then replied by a general denial to each of said paragraphs of answer.

The issues joined were tried by a jury, and a verdict was returned for the appellees.

The appellant's motion for a new trial having been overruled, and its exception entered to this ruling, judgment was rendered on the verdict.

The appellant has assigned, as errors, the decisions of the court below, in overruling its demurrer to the second paragraph of the appellees' answer, and in overruling its motion for a new trial.

In the first paragraph of their answer, the appellees alleged, that the note in suit was given without any consideration whatever.

The second paragraph of said answer was as follows:

“ 2. That the note, upon which this suit is founded, was executed by the defendant Peter Cardwell, as principal, and by the said other defendants, as sureties for the said Cardwell, in consideration of a valid paid-up life policy, to be issued and delivered to said Cardwell by the plaintiff, and for no other or different consideration whatever; that, although a reasonable time for the issuing and delivering of said policy to the said Cardwell, by the said plaintiff, has long since elapsed, yet the plaintiff has wholly neglected and refused to execute and deliver to said Cardwell a valid life policy for the value of said note. Wherefore the defendants say, that the consideration of said note has wholly failed.”

It seems to us, that the appellant's demurrer to this paragraph of answer ought to have been sustained. It will be observed, from the averments of this paragraph, that it was therein and thereby intended and attempted to show that the consideration of the note in suit had wholly failed. It was alleged, that the note was executed in consideration of an agreement by and between the appellant and Peter Cardwell, one of the appellees. The terms of this agreement are not stated with much clearness or certainty, in this second paragraph of the answer; but, from all the averments of the paragraph, it would seem that the agreement stated was substantially as follows:

The note in suit was executed by the appellees, in consideration of an agreement on the part of the appellant, that it would thereafter execute and deliver to the appellee Peter Cardwell a valid paid-up life policy “ for the value of said note.”

It will be seen that the time for the execution and delivery by the appellant, of the valid paid-up life policy, is not expressly stated in the answer, but, from the fact averred, that the policy to be executed and delivered was to be “ for the value of said note,” and as the value of the

note could not be ascertained with certainty, until after the payment of said note, it must be inferred, we think, that the agreement of the appellant was to execute and deliver the valid paid-up life policy to the appellee Cardwell upon or after the payment of the note in suit. This was the agreement between the appellant and the appellees, as we gather the same from the allegations of the second paragraph of the answer, upon the faith of which the note in suit was executed. The appellees did not allege that the appellant ever agreed to execute and deliver to the appellee Cardwell a valid paid-up life policy within a reasonable time; but they did allege, that the appellant was to execute and deliver such policy "for the value of said note." As the value of the note could not be definitely ascertained until after its payment, it would seem to follow that the appellant's agreement, as stated in the answer, was "to execute and deliver to said Cardwell a valid life policy for the value of said note," when said note was paid.

We have said that the appellees had failed to allege that the appellant agreed to issue and deliver to the appellee Cardwell the valid paid-up life policy, either at a certain time, or within a reasonable time. They did allege, however, as a breach apparently of the appellant's agreement, that, although a reasonable time for the issuing and delivering of said policy to said Cardwell, by the appellant, had long since elapsed, yet the appellant had wholly neglected and refused to execute and deliver such policy to said Cardwell. This allegation was not a breach of the agreement stated in the answer.

Again, it is alleged in this second paragraph of answer, that the note in suit was executed "in consideration of a valid paid-up life policy, to be issued and delivered to said Cardwell by the plaintiff, and for no other or different consideration whatever." It will be observed that the appellant's agreement, as here stated, was to issue and deliver to

Franklin Life Ins. Co. of Indianapolis v. Cardwell *et al.*

said Cardwell a "valid paid-up life policy;" but the agreement, as stated, did not indicate, in any way, what was the agreed amount or value of such valid paid-up life policy. Yet the breach of the agreement, as the breach is alleged in the answer, was, that the appellant had wholly neglected and refused to execute and deliver to said Cardwell a valid life policy for the value of said note. It is very evident, we think, that the breach thus stated in the answer was not a breach of the alleged agreement, which constituted the only consideration of the note in suit. For, in the latter agreement, as stated in the answer, there was no allegation from which the amount or value of the valid paid-up life policy could possibly be ascertained; while, in the agreement, of which a breach was alleged in the answer, the amount or value of the valid life policy is made to depend upon the value of said note. Viewed in every possible light of which we can conceive, it seems very clear to our minds, that the allegations of this second paragraph of answer were not sufficient to show a total, or even partial, failure of the consideration of the note in suit; and it is evident, we think, that the facts alleged in this paragraph were pleaded by the appellees with the intent and purpose of showing thereby an absolute, complete failure of the consideration of said note. Therefore we must hold, as we do, that the court erred in overruling the appellant's demurrer to the second paragraph of the appellees' answer.

Having reached this conclusion in regard to the insufficiency of the second paragraph of the answer, which will necessarily lead to the formation of new issues, and a new trial of the cause, we need not now consider and decide any of the questions arising under the alleged error of the court, in overruling the appellant's motion for a new trial. On such new trial these questions may not arise again, or, if they should, it is hardly probable that they will be again

McKinley *et al.* v. Snyder.

presented in the same form. We pass them by, at this time, without decision.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to sustain the appellant's demurrer to the second paragraph of the appellees' answer, and for further proceedings.

McKINLEY ET AL. v. SNYDER.

REFLEVIN BAIL.—*Stay of Execution beyond Six Months.*—*Failure of Co-Recognizor to Sign.*—The attorney of the judgment creditor having proposed to the judgment debtor to stay execution on a judgment for fifteen months, if the latter would procure certain persons to execute the necessary recognizance, and such recognizance, in the form "We," naming the bail proposed "hereby acknowledge ourselves replevin bail," etc., having been prepared, was signed by one of the recognizors only, to become operative when signed by the other; but it was never either signed by the latter or approved by the clerk.

Held, that the recognizance never became operative.

From the Montgomery Circuit Court.

P. L. Kennedy, W. T. Brush, G. D. Hurley and B. Crane,
for appellants.

B. T. Ristine, T. H. Ristine, H. H. Ristine, A. Thomson,
and *J. McCabe*, for appellee.

PERKINS, J.—The general facts of this case are as follows:

Jacob W. McKinley recovered a judgment for \$981.05, in the circuit court of Montgomery County, Indiana, on the 26th Day of April, 1875, against Samuel Harlow and James H. Steel.

McKinley et al. v. Snyder.

On July 20th, 1875, the following entry was made on the order book of said court, below said judgment, and was signed by Joseph Snyder, the appellee, only :

"We, Garrett Harlow and Joseph Snyder, hereby acknowledge ourselves replevin bail for the stay of execution on the above judgment, for the payment of the same, together with interest and cost accrued and to accrue, and the plaintiff agrees that execution shall not issue on this judgment for the term of fifteen months from this date, July 20th, 1875.

— — — — —
"JOS. SNYDER."

This undertaking was never completed. It was never signed by Garrett Harlow, whose name appears in the body ; nor was it ever approved by the clerk of the circuit court. And the day this suit was instituted an effort was being made to have an execution issued on said judgment, against said Snyder, as replevin bail. And this suit was brought by him, asking to be declared released from any liability by reason of his signature.

The cause was tried by a jury, and a verdict found for Snyder, the appellee, and, over a motion for a new trial, judgment was rendered on the verdict.

The appellant states the facts of the case, in his brief, thus :

"Jacob McKinley, appellant, recovered a judgment in the Montgomery Circuit Court, against Samuel Harlow and James H. Steel. The judgment debtors wanted a stay of execution and an extension of the time thereof beyond the statutory period ; and Steel, one of the judgment debtors, and Snyder, the appellee, went to see Hurley, attorney of McKinley, the appellant, who agreed with the parties named, that, if they would procure replevin bail, execution should be withheld for fifteen months. Said Hurley wrote the replevin bond, as it appears in the record, being informed by the judgment defendant Steel and the appel-

lee, Snyder, that one Garrett Harlow was going on the replevin bond also. The parties all went to the clerk's office; the deputy-clerk copied the replevin bond, as written by Hurley, below the judgment, in the order book; Snyder, appellee, signed it, and the clerk told Snyder he would withhold his approval till Garrett Harlow should also sign it. Harlow never did sign it, and it remained in that condition until the fifteen months had expired, upon which McKinley ordered execution against Snyder, who thereupon brought this suit to secure a release from said recognizance."

The appellants make three points:

1. That the appellee was negligent, in delaying this suit such a length of time.

2. That, when Snyder signed his name as replevin bail upon the record, the entry became a judgment confessed, as against him. 2 R. S. 1876, pp. 203, 311, secs. 427, 790.

3. If the recognizance of bail is not valid as a judgment, it is a contract, and therefore the party should not be released from it. *Sanford v. Freeman*, 5 Ind. 129.

On the other hand, the appellee insists that the position of the appellant, as to negligence, is not tenable, because the entry in question was never binding upon him, either as a judgment or as a contract, for the reason that it was never perfected, as the appellant well knew; that hence it did not delay execution on the judgment, nor subject appellee to any liability; further, that it was invalid as a recognizance of bail, because not in conformity to the requirements of the statute. 2 R. S. 1876, p. 201, sec. 420, and notes on page 202.

We think the following synthetic statement presents the fair result of an analysis of the evidence in the case, with the conclusions we draw from it:

Kellogg et al. v. Tout et al.

The appellant McKinley, on a certain day, recovered a judgment for a certain amount, in the Montgomery Circuit Court, against Samuel Harlow and James H. Steel, upon which, if not stayed, execution might issue. Said McKinley, by his attorney, proposed to the judgment debtors, that, if they would procure Garrett Harlow and Joseph Snyder to sign, upon the record or order book of said court, below the judgment, an entry which should be a copy of the paper said attorney then and there drafted, he would delay the issue of such execution on said judgment for fifteen months. Snyder, pursuant to the above proposition of McKinley, signed such entry on the order book, to become operative when Garrett Harlow should sign it. As said Harlow never signed it, the signature of Snyder never became operative; the proposition of McKinley was never accepted; execution was never stayed, and might, therefore, have issued at any time; McKinley knew, or ought to have known, the fact, and it was, therefore, his own negligence in delaying to issue it, on the failure of Harlow to sign the proposed entry. He voluntarily withheld execution on the judgment, without security being given, and he must suffer the consequences.

The court did not err in overruling the motion for a new trial.

See *The Vincennes National Bank v. Cockrum*, 64 Ind. 229.

The judgment is affirmed, with costs.

KELLOGG ET AL. v. TOUT ET AL.

VENDOR'S LIEN.—Sale by Commissioner in Partition.—Foreclosure for Purchase-Money.—Decree.—Judgment.—Appraisement.—Sheriff's Sale on Certified Copy, Issued after Death of Debtor.—Revivor.—Complaint by Heirs, to

Redeem.—Exhibit.—Demurrer Carried Back.—Certain tracts of land having been sold, and certificates of purchase issued, severally, to purchasers, by a commissioner in partition, and one of the purchasers having obtained assignments of the certificates of the others, the commissioner obtained a judgment against him for the unpaid balance of the purchase-money, and a decree of foreclosure, subject to appraisement; and, the judgment debtor then dying, the real estate was sold at sheriff's sale, to a third person, for the sum necessary to satisfy such decree and costs, and a sheriff's deed was duly made, on a certified copy of such decree, issued subsequent to the decease of the debtor. The heirs of the debtor then sued the sheriff's grantee, seeking to redeem, or to obtain a decree for the purchase-money paid by the decedent, setting out in their complaint the record of such proceedings, alleging the foregoing facts, and averring that such sale was invalid.

Held, on demurrer to the answer, carried back to the complaint, that such record forms no part of the complaint, which is insufficient.

Held, also, that, in such case, sale upon the certified copy of the decree was proper, that it was not necessary to revive the decree against the heirs, and that it was properly issued after such decease.

Held, also, that an averment that the sale was invalid because "no valid appraisement had been made" is an averment of a conclusion of law.

Held, also, that the heirs were not entitled to either form of relief sought.

Held, also, that, though there may have been erroneous rulings, adverse to the plaintiffs, upon demurrer to the answer, and on the trial, yet, as the complaint was insufficient, judgment against them was proper.

From the Marion Superior Court.

C. P. Jacobs, for appellants.

BIDDLE, J.—Complaint to redeem lands from a judicial sale, or, in the alternative, to recover for payments made, and declare the same a lien upon the lands. The complaint contains two paragraphs; but, as the second states the cause of action more fully than the first, and is the one mainly relied upon by the appellants, we omit the first, and state the material facts averred in the second, as follows:

That the plaintiffs are the children and heirs of Henry S. Kellogg, who died June 27th, 1860; that, before and at the time of his death, he was the equitable owner, in fee-simple, of certain lands, which are particularly described,

Kellogg et al. v. Tout et al.

subject to an equitable lien in favor of the grantor, who made sale of the lands as a commissioner under certain judicial proceedings in petition for partition ; that the title of Kellogg was evidenced by a certificate of purchase executed by the commissioner to him, bearing date December 22d, 1855.

The complaint here sets out the proceedings in partition, resulting in a sale by the commissioner of the premises, which consisted of certain lots numbered 1, 2, 3, 4, 5, 6, 7 ; that the terms of the sale were one-third of the purchase-money in hand, and the balance in two equal annual instalments ; that Kellogg purchased at the sale lots 1, 3, 5, 6, 7 ; that Henry Brancamp purchased lot 2, and Lewis Morris lot 4 ; that each of the purchasers paid the first instalment, and secured the remaining instalments ; and each received a certificate of purchase accordingly from the commissioner making the sale ; that Kellogg purchased lot 2 of Brancamp, and lot 4 of Morris, and took their certificates of purchase by assignments from them, thus making Kellogg the equitable owner of the seven lots.

The complaint then avers, that, upon non-payment of the third instalment due upon the lots, the commissioner, on the 2d day of December, 1859, brought suit against Kellogg to collect the balance due, and to foreclose the equity of redemption in the certificates of purchase, and obtained judgment against Kellogg for the amount due, subject to appraisement, and a decree of foreclosure upon the certificates ; that afterwards, upon the 27th day of June, 1860, in the forenoon, and after the death of Henry S. Kellogg, a certified copy of said judgment and decree of foreclosure was issued and delivered to the sheriff of Marion county, by virtue of which, and without any other authority, he sold the lands to Sarah E. Tout, and other persons named, for the amount due on the judgment, interest and costs,

which thus became wholly satisfied—making a complete transcript of the record and return of the sheriff thereon an exhibit; that, in pursuance of the sale, the sheriff executed a deed to the purchasers, who entered into possession of the premises under the same, and not otherwise; that the sale is invalid, because no execution was ever issued to the sheriff thereon, but only a certified copy of said decree, and because the writ, if otherwise legal, was issued after the death of Kellogg, the defendant thereto, and the sale made without any revivor of the judgment and decree against the plaintiffs, or any of the heirs of Kellogg, deceased, and, further, because there was no valid appraisement of the rents and profits of said lands, and no valid appraisement of the fee simple of said lands, ever made as required by law; that, before the commencement of this suit, the plaintiffs demanded an accounting of defendants, which they refused; that Kellogg had paid certain sums of money on his purchase from the commissioner, before the sale under the decree of foreclosure was made, which enured to the benefit of the property, and of all of which the defendants had notice at the time they purchased under the decree.

Prayer to redeem, or to recover for the payments thus made, etc.

An answer of nineteen paragraphs was filed to the complaint, to several of which demurrers, alleging as ground the insufficiency of the facts therein stated to constitute a defence, were overruled, and to others sustained. We do not particularly state the several paragraphs of answer, as the demurrers to them reach the complaint and test its sufficiency, which is the first question for our consideration.

In examining the complaint we may premise by saying that the record of the judgment, decree and sale under which the appellees claim, is not the foundation of the appellants' action, and therefore is not properly an exhibit to

Kellogg *et al.* v. Tout *et al.*

be filed with the complaint ; and filing it, when not a proper exhibit, does not aid the averments in the complaint in the least. Indeed, the record is not before us at all. *Trueblood v. Hollingsworth*, 48 Ind. 537. We must look, therefore, to the averments of the complaint proper for its sufficiency. The proceedings, judgment and decree foreclosing the equity of redemption of the certificates of purchase held by Henry P. Kellogg, and the sale made under them, must be held valid unless the averments in the complaint show them to be void. It is not enough to show merely an irregularity ; they must be shown to be void. The averments against the validity of the proceedings and sale are,

1st. That no execution was ever issued thereon ;

2d. That the sale was made by the sheriff on a certified copy of the decree ;

3d. That the copy of the decree, upon which the sale was made, was issued and placed in the hands of the sheriff for execution, after the death of Kellogg, the judgment defendant ;

4th. That no valid appraisalment of the rents and profits of the lands was made before sale ; and,

5th. That no valid appraisalment of the fee-simple in said lands was made before the sale.

We may say at once, that there is no validity in the first and second objections taken as above. No execution, except the copy of the decree, is necessary in such cases, when there is no personal judgment for a deficiency ; and the copy of the decree is the proper authority for the sheriff to make the sale.

The third objection presents a more difficult question. This court has decided, that, when lands have been levied upon by a *fiery facias*, and the judgment defendant dies before execution, the sheriff may still advertise and sell the same, notwithstanding his death, and without revivor ; *Doe v. Heath*, 7 Blackf. 154 ; and, also, has decided,

that, when such levy has been made, a *venditioni exponas* may be issued after the defendant's death, and the sale of property made under it. *Doe v. Hayes*, 4 Ind. 117. When there is a decree of foreclosure of a mortgage, and no personal judgment for any deficiency, and no execution issued thereon before the death of the mortgagor, an action will not lie to revive the judgment, upon the ground that it is unnecessary, as the execution may be issued and the sale made after the death of the judgment defendant, without revivor. *Hays v. Thomae*, 56 N. Y. 521. RAPALLO, J., in delivering the opinion of the court in the case, said :

“ We think that this action was unnecessary. The decree made and entered before the death of the mortgagors could be executed notwithstanding their death, and binds all persons claiming any interest under them. It is to be enforced only by a sale of their interest in the property. No part of it is to be enforced *in personam*. The case of *Harrison v. Simons* (3 Edw. Ch. R. 394) is in point, and was, we think, correctly decided. There the death took place before enrollment of the decree. The court held that the death did not prevent the enrollment, and consequently did not prevent the execution of the decree, and denied the application to revive, as unnecessary.”

There seems to be a distinction, as to the effect of the death of a sole defendant after judgment and before execution, between judgments *in personam*, which can not be executed except by a writ that authorizes the officer to levy upon any property of the defendant subject to execution, and judgments *in rem*, which require no writ of execution, and can not be executed except in the particular manner decreed. In the former class of cases, a writ of execution issued after the death of a sole defendant is void ; in the latter class of cases, where the decree is its own authority for execution, and where nothing can be done except what was adjudicated in the lifetime of the parties, it may be executed after the death of a sole defendant. The case we

Kellogg *et al.* v. Tout *et al.*

are considering falls within the latter class. Decrees upon mortgages, where there is no judgment in *personam* for a contingent deficit, are executed by a copy of the order of sale; 2 R. S. 1876, p. 263, sec. 635; and a vendor of real estate may proceed upon his unpaid lien for the purchase-money, the same as if it was secured by a mortgage. *Amory v. Reilly*, 9 Ind. 490; *Jackson v. Snell*, 34 Ind. 241; *Milligan v. Poole*, 35 Ind. 64; *Wilson v. Fatout*, 42 Ind. 52.

The averments, that there was no valid appraisement of the rents and profits of the lands sold, and no valid appraisement of the fee-simple of the lands, are wholly insufficient. They imply that there was an appraisement of the rents and profits, and also of the fee, yet aver no fact showing wherein and why said appraisement was invalid. The averments are simply conclusions of law, and not statements of facts.

It appears to us that the complaint is insufficient to show that the proceedings under which the appellees claim the lands in dispute were void; and, being insufficient, the appellants can not complain because the judgment is against them, although there may be error in the rulings upon their demurrers to appellees' answers, and also at the trial of the case. The appellants can not redeem the lands, after foreclosure and sale, unless the proceedings are void; and, not being void, they are not entitled to recover back any part of the purchase-money paid.

The following cases may be consulted as throwing light upon the question here discussed: *Doe v. Harter*, 1 Ind. 427; *Whitehead v. Cummins*, 2 Ind. 58; *Wilkins v. DePauw*, 10 Ind. 159; *Julian v. Beal*, 26 Ind. 220; *May v. Fletcher*, 40 Ind. 575; *Davis v. Langsdale*, 41 Ind. 399; *McKernan v. Neff*, 43 Ind. 503; *Brent v. Oyler*, 49 Ind. 453; *Coombs v. Carr*, 55 Ind. 303; *Baker v. Armstrong*, 57 Ind. 189; *Dixon v. Hunter*, 57 Ind. 278; *Ricketts v. Dorrell*, 59 Ind. 427; *Britz v. Johnson*, *post*, p. 561.

The judgment is affirmed, at the costs of the appellants.

The Pullman Palace Car Co. v. Taylor.

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THE PULLMAN PALACE CAR CO. v. TAYLOR.

PRACTICE.—Judgment on Demurrer.—Damages to be Assessed on.—When a defendant elects to stand upon his answer, to which a demurrer has been sustained, the only question for the court is the assessment of the damages.

SAME.—Supreme Court.—Record.—Evidence.—Where, in such case, evidence has been introduced as to the amount of damages to be assessed, but is omitted from the record on appeal to the Supreme Court, no question can arise as to the amount of damages assessed.

RAILROAD.—Passenger.—Sleeping-Car Berth.—Ticket.—Change of Cars.—Action for Damages.—A passenger purchased, of a corporation engaged in furnishing sleeping cars for the use of passengers over a certain continuous line of railroads, a ticket purporting to entitle him to accommodations between certain stations, in a certain sleeping car, and in a berth to be designated on the ticket, by the conductor of such car, in the manner directed by the ticket. Upon entering that car at the starting-point, a certain berth was assigned to him, and designated on the ticket, in the manner provided by it, by the conductor, but, before arriving at his destination, such car was removed from the train by the defendant, and a different berth in a different sleeping car was offered to him, which he refused, and sued such corporation for a breach of its contract.

Held, that, by the contract evidenced by the ticket, the passenger was entitled to a continuous passage in such berth, on such car, or in an equally desirable berth on an equally safe, convenient and comfortable sleeping car.

SAME.—Defence.—Contract between Sleeping-Car Company and Railroad Company.—An answer in such action, alleging that the defendant had simply furnished such car to the railroad companies, for the use of passengers, for a certain rent, pursuant to a contract between it and such companies, but admitting that the change of cars was made as alleged in the complaint, is insufficient.

From the Marion Superior Court.

C. Baker, T. A. Hendricks, O. B. Hord and A. W. Hendricks, for appellant.

C. W. Smith and R. O. Hawkins, for appellee.

WORDEN, J.—Complaint as follows :

“Harry Taylor complains of the Pullman Palace Car Company, a corporation engaged in the business of carrying passengers as common carriers throughout the United States, and particularly between the cities of Indianapolis, in the State of Indiana, and New York, in the State of

The Pullman Palace Car Co. v. Taylor.

New York, and were so engaged on and prior to the 31st day of March, 1874. That, on said 31st day of March, 1874, this plaintiff engaged passage on one of the cars of the defendant, commonly known as a Pullman Palace or Sleeping Car, and selected his berth in said car, which berth was the lower berth in the centre of said car, and known as berth 'Lower Six.' That said berth was preferable to other berths in said car, or other cars, as being more comfortable, and safer in case of accidents. That, for his passage to the city of New York, in said berth in said car, he paid to the defendant the sum of five dollars, and, in consideration of said payment of said sum of five dollars, the defendant undertook and agreed to carry the plaintiff from Indianapolis to New York, in said car and in said berth, and gave to this plaintiff their certain ticket or check in print, a copy of which is as follows :

| Berth Check. | | Upper. | Lower. |
|---|---|--------|--------|
| The Sleeping Car Conductor will punch out, on the following Diagram, the date and the amount of room to which the holder of this check is entitled. | | 1 | 1 |
| 1 | CAR <div style="text-align: center;">96</div> From <div style="text-align: center;">Indianapolis</div> To <div style="text-align: center;">New York.</div> <div style="text-align: center;">\$5.00.</div> <div style="text-align: center;">W. T. Cannon,</div> <div style="text-align: right;">Conductor.</div> | 2 | 2 |
| 2 | | 3 | 3 |
| 3 | | 4 | 4 |
| 4 | | 5 | 5 |
| 5 | | 6 | 6 |
| 6 | | 7 | 7 |
| 7 | | 8 | 8 |
| 8 | | 9 | 9 |
| 9 | | 10 | 10 |
| 10 | | 11 | 11 |
| 11 | | 12 | 12 |
| 12 | | 13 | 13 |
| 13 | | 14 | 14 |
| 14 | | A | A |
| 15 | B | B | |
| 16 | C | C | |
| 17 | | | |

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"On which ticket, on the diagram thereof, the conductor of the said car then punched, in the column of months, the month of March; and, in the days of the month, the 31st, and, in the columns designated 'Upper' and 'Lower,' the figure 6; thereby intending to express that the holder of said ticket was thereby entitled to a passage from Indianapolis to New York, on car No. 96, in lower berth No. 6, starting March 31st, for which he had paid the sum of five dollars, and that said diagram and ticket was received by this plaintiff as expressing such agreement.

"And the plaintiff further says, that afterward, while on said car, occupying said berth, *en route* for the city of New York, according to the terms of said agreement, the said plaintiff was notified by the agents of the defendant in charge of said car, that he must surrender and give up his said berth in said car, and take passage in another car in said train, and that said car No. 96 would be detached from said train, and would not be taken to New York; that, in fact, said car was so detached and left behind, and this plaintiff was compelled to remove his baggage and take passage in another car of the plaintiff's (*sic*) in said train.

"That, in said last named car, the berth corresponding to the one occupied by this plaintiff in car No. 96, and to which he was entitled from Indianapolis to New York, was occupied by another party, who had a prior right thereto, and this plaintiff was thus deprived of his said berth, and the defendant did not provide him any other accommodation or berth in said car, similar or equal in comfort and safety to those to which he was entitled, under his agreement, in said car No. 96, and the said defendant wholly failed, neglected and refused to provide him any berth or seat in said car, save the upper berth over the hind axle of said car, which was an uncomfortable and dangerous position to occupy. That this plaintiff refused to occupy such berth on account of its so being uncomfort-

The Pullman Palace Car Co. v. Taylor.

able and dangerous; and this plaintiff was compelled to and did leave said sleeping or palace car, and was compelled to take passage in a common passenger car, conducted with said train, where there was no accommodation for passengers, similar to, or equal in comfort and safety to, those provided by said defendant by said car and berth in which this plaintiff engaged his passage from Indianapolis to New York; that, by reason of said failure of said defendant to fully comply with her said agreement and undertaking, this plaintiff was deprived of sleep during the remainder of his journey from Indianapolis to New York, and suffered great discomfort and annoyance and vexation, both of body and of mind, and injury to his health, so as to render him disqualified and unable to properly and successfully attend to business for the period of twenty-four hours after his arrival in the city of New York.

“Wherefore he says, by the reason of the fault, negligence and wrongdoing of the defendant, he has been damaged in the sum of four hundred and ninety-five dollars, for which sum, together with his costs, he prays judgment.”

The defendant demurred to the complaint, for want of sufficient facts, but the demurrer was overruled, and exception taken.

It then answered in three paragraphs, in the first of which it is averred, that—

“It is a corporation, organized and existing under and by authority of a certain act of the General Assembly of the State of Illinois, approved February 22d, 1867, and that said company, among other powers, possesses those conferred by the fourth section thereof, which is as follows:

“SECTION 4. The said corporation shall have power to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons travelling

therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper.'

"It further avers, that, at the time of the happening of the grievances alleged in the complaint, the Pittsburgh, Cincinnati and St. Louis Railway Company was operating a certain railroad extending from the city of Indianapolis, in the State of Indiana, through the States of Ohio and West Virginia, to the city of Pittsburgh, in the State of Pennsylvania, and that the Pennsylvania Railroad Company was then operating a railroad extending from said city of Pittsburgh to the city of New York, in the State of New York, and said railway companies were carriers of passengers between said points; that, at said time and prior thereto, the defendant was furnishing drawing-room and sleeping cars to said companies, to be operated by them upon said roads between said points, under and by virtue of a certain written and printed contract with said railway companies; that, by said contract, the defendant was to furnish the drawing-room and sleeping cars, sufficient to meet the requirements of travel to be used by said railway companies in the transportation of passengers; that, under and by virtue of said contract, the defendant was to keep the carpets, upholstering and bedding of said cars in good order and repair, except repairs and renewals made necessary by accident or casualty happening to said cars while running upon said railroads, and said railway companies thereby agreed to repair all damages to said cars, of every kind occasioned by accident or casualty.

"And the defendant thereby agreed, at its own cost and expense, to furnish one or more employees, as might be needful, upon each of said cars, whose business it should be to collect fare for the accommodations in said cars, and generally to wait upon passengers therein, and provide for their comfort. And it was also thereby agreed, that said

The Pullman Palace Car Co. v. Taylor.

employees of the defendant should be governed by, and subject to, the rules and regulations of the said railway companies, which then existed or might thereafter be adopted from time to time, for the government of their own employees.

"And it was thereby agreed, that said railway companies would haul said cars of the defendant on their passenger trains, in such manner as would best accommodate the passengers desiring to use said cars, and that said railway companies should, at their own expense, furnish fuel for said cars, and material for the lights used therein, and should wash and cleanse said cars, and keep the same in good running order and repair, including renewals of worn-out parts, and all things appertaining to said cars necessary to keep them in first-class condition, except as hereinbefore stated. And it was also thereby agreed that said railway companies would furnish to the defendant, at convenient points, room and conveniences for airing and storing bedding.

"And it was then and thereby agreed, by and between said railway companies and the defendant, that it should be entitled to collect, from each and every person occupying said cars, such sums as were usual on competing lines furnishing equal accommodations, and that such rules and regulations should be mutually agreed upon as would most favor the renting of seats and couches in said cars.

"And it was then and thereby agreed, by and between said railway companies and the defendant, that the defendant might place its tickets for seats and couches for sale in such of the railroad ticket offices of said railway companies as might be mutually agreed upon, and that such service should be performed by and as part of the general duties of the ticket agents of said railway companies, without charge to the defendant.

"And it was further thereby agreed, that said agreement

should last for fifteen years from the 27th day of January, 1870.

"And it was further thereby agreed, that, should the defendant fail to keep in good and cleanly condition the upholstering and bedding of said sleeping cars, then and in that case said railway companies should give the defendant timely notice to perform said duties, and should require the defendant to make good such deficiency; if, after such notice, the said defendant should fail, within a reasonable time, to make good such deficiency, then and in that case said railway companies should have the option to declare said contract ended and no longer in force.

"The defendant avers, that, at the time mentioned in the complaint, the cars of the defendant were upon said roads from said city of Indianapolis to the city of Pittsburgh, and thence to the city of New York, and were being operated upon said roads under and by virtue of said contract, and according to its terms; that said railway companies were entitled to receive compensation for the carrying of passengers, and the defendant was only entitled to receive compensation for the sitting and sleeping accommodations provided in its cars; that the car No. 96, mentioned in the complaint, was one of the defendant's cars, operated by said railway companies under said contract; that the defendant made no contract with the plaintiff to carry him from Indianapolis to New York, or over any portion of said route, and received from him no compensation for any such service, and that whatever contract there was for such service was between the plaintiff and said railway companies.

"The defendant avers, that it did not contract with the plaintiff to carry him from the city of Indianapolis to the city of New York, and it avers that it did contract with him to furnish him sleeping-car accommodations from Indianapolis to the city of New York, and did deliver to him

The Pullman Palace Car Co. v. Taylor.

the ticket described in the complaint, and punched as therein stated, and made with him no other contract, either express or implied.

“ The defendant says, that, upon said car No. 96 reaching Pittsburgh, there were only six persons therein for points east of Pittsburgh, and there were other sleeping cars of the defendant in the train being hauled to New York over said route, in all particulars equal to No. 96, furnishing ample accommodations for them, and said car No. 96 was left at said city of Pittsburgh, and the defendant was unable to furnish the plaintiff, in either of said other cars, lower berth No. 6, because said berth was already taken, and was occupied upon each of the other cars, but they offered and tendered him other lower berths upon the other cars, equally safe and comfortable as the one he had occupied in car No. 96, but the plaintiff refused to accept and occupy the same, and refused to accept any berth upon the other cars, unless he was furnished a berth located as No. 6 was in car No. 96, and this the defendant could not do, for the reason aforesaid; that, upon the plaintiff's refusal to accept the accommodations aforesaid, that were offered him by the defendant, the defendant offered to return to him a proportion of the amount paid for sleeping-car accommodations from Indianapolis to New York, that the distance between Pittsburgh and New York bore to the distance between Indianapolis and New York, and the plaintiff rejected said offer.

“ The defendant further avers, that the price paid by the plaintiff for lower berth No. 6, in car No. 96, was the minimum price charged and received for the use of all other berths in said car.

“ And the defendant denies all the allegations of the complaint inconsistent with the allegations of this paragraph.”

The second is like the first, to the point where the description of the contract between the appellant and the railway companies ends. The paragraph then continues as follows :

“The defendant avers, that, at the time mentioned in the complaint, the cars of the defendant were upon said roads from said city of Indianapolis to the city of Pittsburgh, and thence to the city of New York, and were being operated upon said roads under and by virtue of said contract, and according to its terms; that said railway companies were entitled to receive compensation for the carrying of passengers, and the defendant was only entitled to receive compensation for the sitting and sleeping accommodations provided in its cars; that the car No. 96, mentioned in the complaint, was one of the defendant's cars, operated by said railway companies under said contract; that the defendant made no contract with the plaintiff to carry him from Indianapolis to New York, or over any portion of said route, and received from him no compensation for any such service; and that whatever contract there was for such service was between the plaintiff and said railway companies.

“The defendant avers, that it did not contract with the plaintiff to carry him from the city of Indianapolis to the city of New York, and it avers that it did contract with him to furnish him sleeping-car accommodations from Indianapolis to the city of New York, and did deliver to him the ticket described in the complaint, and punched as therein stated, and made with him no other contract, express or implied.

“The defendant further says, that, when said car No. 96 reached Pittsburgh, there were only six persons therein for points east of Pittsburgh, and that there were in said car twelve sections, six being upon each side, and each section consisting of two berths, an upper and a lower one, thus furnishing twenty-four berths, each capable of accommodat-

The Pullman Palace Car Co. v. Taylor.

ing two persons; that there were in the train, to be hauled over said route from Pittsburgh to the city of New York, two cars of defendant in all respects equal to said car No. 96, with vacant berths, furnishing ample accommodations to the plaintiff and said other occupants of car No. 96, and the defendant desired to and did detach said car No. 96 from said train at Pittsburgh; that the two cars to which the defendant transferred said passengers from said car No. 96 were No. 269, a sleeping car from Louisville to New York, and No. 289, a drawing-room and sleeping car from Chicago to New York; that the defendant was unable to furnish the plaintiff lower berth No. 6 in either of said cars, because said berth was already taken and occupied, but offered him the lower berth in section No. 1, and upper berth in section No. 8, in said car No. 269, the only berths vacant in said car, and also lower berth in the drawing-room of No. 289; said berths so offered the plaintiff were comfortable and safe berths, and the charge for the use and occupation of them was as great as that of lower berth No. 6 in car No. 96.

“ But the plaintiff informed the defendant, that, unless he could have the use and occupation of lower berth No. 6 in one of the other cars or one located just as lower berth No. 6 was, he would not accept any sleeping berth in said cars Nos. 269 and 289, and refused to accept the accommodations offered. The defendant then offered to return to the plaintiff a proportion of the amount paid by the plaintiff for a sleeping berth from Indianapolis to New York that would correspond with the distance from Pittsburgh to New York, as corresponded with the distance from Indianapolis to New York, but the plaintiff refused to receive the same. The defendant further says, that, as the defendant was unable to furnish the plaintiff lower berth No. 6 in said cars Nos. 269 and 289, he refused to accept any other berth, and left the car of the defendant.

"And the defendant denies all the allegations of the complaint inconsistent with the allegations of this paragraph."

The third is the same as the first to the point where the description of the contract between the appellant and the railway companies ends.

The paragraph continues as follows :

"The defendant avers, that, at the time mentioned in the complaint, the cars of the defendant were upon said roads from said city of Indianapolis to the city of Pittsburgh, and thence to the city of New York, and were being operated upon said roads under and by virtue of said contract and according to its terms ; that said railway companies were entitled to receive compensation for the carrying of passengers, and the defendant was only entitled to receive compensation for the sitting and sleeping accommodations provided in its cars ; that the car No. 96, mentioned in the complaint, was one of the defendant's cars, operated by said railway companies under said contract ; that the defendant made no contract with the plaintiff to carry him from Indianapolis to New York, or over any portion of said route, and received from him no compensation for any such service, and that whatever contract there was for such service, was between the plaintiff and said railway companies.

"The defendant avers, that it did not contract with the plaintiff to carry him from the city of Indianapolis to the city of New York, and it avers that it did contract with him to furnish him sleeping-car accommodations from Indianapolis to the city of New York, and did deliver to him the ticket described in the complaint, and punched as therein stated, and made with him no other contract, express or implied.

"The defendant further says, that, when said car No. 96 reached Pittsburgh, there were only six persons therein

The Pullman Palace Car Co. v. Taylor.

for points east of Pittsburgh, and that there were in said car twelve sections, six being upon each side, and each section consisting of two berths, an upper and a lower one, thus furnishing twenty-four berths, each capable of accommodating two persons; that there were in the train, to be hauled over said route from Pittsburgh to the city of New York, two cars of defendant, in all respects equal to said car No. 96, with vacant berths, furnishing ample accommodations to the plaintiff and said other occupants of No. 96, and the defendant desired to and did detach said car No. 96 from said train at Pittsburgh; that the two cars, to which the defendant transferred said passengers from said car No. 96, were No. 269, a sleeping car from Louisville to New York, and No. 289, a drawing-room and sleeping car from Chicago to New York; that the defendant was unable to furnish the plaintiff lower berth No. 6 in either of said cars, because said berth was already taken and occupied, but offered him the lower berth in section No. 1, and upper berth in section No. 8, in said car No. 269, the only berths vacant in said car, and also the lower berth in the drawing-room of No. 289, and said berths so offered the plaintiff were comfortable and safe berths, and the charge for the use and occupation of them was as great as that of lower berth No. 6, in car No. 96.

“But the plaintiff informed the defendant, that, unless he could have the use and occupation of lower berth No. 6 in one of the other cars, or one located just as lower berth No. 6 was, he would not accept any sleeping berth in said cars Nos. 269 and 289, and refused to accept the accommodations offered. The defendant then offered to return to the plaintiff a proportion of the amount paid by the plaintiff for a sleeping berth from Indianapolis to New York that would correspond with the distance from Pittsburgh to New York, as corresponded with the distance from Indianapolis to New York, but the plaintiff refused

to receive the same. The defendant further says, that, as the defendant was unable to furnish the plaintiff lower berth No. 6, in said cars Nos. 269 and 289, he refused to accept any other berth, and left the car of the defendant.

"The defendant avers, that the train, of which said car No. 96 constituted a part, arrived at Pittsburgh about noon of the 1st day of April, 1874, and immediately thereafter proceeded to the city of New York; that said railway company had a train that regularly left said city of Pittsburgh for the city of New York about midnight, and the defendant is unable to give the exact time of the starting of the said train from Pittsburgh, and it was the custom of said railway company to have connected with said train a sleeping car of the defendant for the accommodation of the travelling public desiring sleeping-car accommodations who were being transported by said railway company upon said train; that the sleeping car attached to said train leaving Pittsburgh on the night of said 1st day of April was a car of defendant, known as double-drawing-room car No. 129; that, prior to the arrival of said car No. 96 at Pittsburgh, the Thomas Orchestra Troupe had contracted with said Pennsylvania Railroad Company to transport them from the city of Pittsburgh to the city of New York, upon the train that left said city of Pittsburgh about midnight of the 1st day of April, 1874, and with the defendant for sleeping-car accommodations while being thus transported, and said railway company contracted with said troupe that they should thus be transported in said car No. 129, and said defendant, because of said contract with said railway company, contracted with them that they should be furnished with sleeping-car facilities, it being desired by said troupe that they should be transported together as one party, and their number was such as to fill said car, and said car 129 was used as contracted for in the transportation of said troupe by said midnight train. In consequence

The Pullman Palace Car Co. v. Taylor.

of said car 129 being exclusively used in furnishing accommodations to said troupe, it became and was necessary to attach another sleeping car to said midnight train, for the purpose of accommodating such of the travelling public being transported thereon as might desire sleeping-car accommodations; and the defendant says that it became and was necessary, to accommodate the travelling public being transported on said midnight train, and who desired sleeping-car accommodations, to provide a car in addition to said car 129; that, to secure this accommodation to the travelling public, it was necessary to use said car No. 96, and said car No. 96 was detached from the train in which it had been drawn from Indianapolis to Pittsburgh, on its arrival at the latter city, as hereinbefore stated, for the purpose of being attached to said midnight train, and was so used as a part of said midnight train from the city of Pittsburgh to the city of New York, in the transportation of passengers by said railroad company, between said points, and in the accommodation of said passengers with sleeping-car accommodations by said defendant; that said plaintiff, upon his arrival at Pittsburgh, remained upon the train upon which he arrived, and was transported to the city of New York thereon.

“And the defendant denies all the allegations of the complaint inconsistent with the allegations of this paragraph.”

Demurrers were sustained to each of the several paragraphs of answer, and the defendant excepted. The defendant elected to stand on its answer and declined to answer further. Thereupon, says the record, the cause was submitted to the court for trial. This could only mean that the cause was submitted to the court for the assessment of damages, inasmuch as there was no issue of fact to try. The court assessed the plaintiff's damages at fifty dollars, and rendered judgment accordingly.

The Pullman Palace Car Co. v. Taylor.

The judgment thus rendered at special term was affirmed at general term.

It may be observed, as preliminary to the consideration of the main questions involved, that no question can arise as to the amount of damages assessed, the evidence not being in the record, and no question being preserved in relation thereto.

We do not find any objection made in the brief of counsel for the appellant to the complaint, which to us seems to be good.

We pass to the answer.

It may be seen, that, in the complaint, it was alleged that the defendant was a corporation engaged in the business of carrying passengers as a common carrier.

The counsel for the appellant controvert the proposition that it is a common carrier. We think, for the purposes of the case, it is not necessary to determine whether the appellant is to be regarded as a common carrier, or otherwise.

The defendant did not undertake to transport the plaintiff from Indianapolis to New York, either as a common carrier or otherwise. The contract for transportation was made with the railroad company or companies of whom he purchased tickets for the transportation.

It is alleged in each paragraph of the answer that the defendant did contract with the plaintiff to furnish him sleeping-car accommodations from Indianapolis to New York, and did deliver to him the ticket described in the complaint, and punched as therein stated, and made with him no other contract, express or implied.

It seems to us to be clear, that the contract with the plaintiff imposed the obligation upon the defendant, to furnish the sleeping-car accommodations for a continuous trip from one point to the other, so that the plaintiff could go on with the continuous train, as he might be bound to

The Pullman Palace Car Co. v. Taylor.

do on the purchase of an ordinary railroad ticket without provision for stopping off. See *Dietrich v. The Pennsylvania R. R. Co.*, 71 Pa. State, 432; *The Oil Creek, etc., Railway Co. v. Clark*, 72 Pa. State, 231; *Cheney v. The Boston and Maine R. R. Co.*, 11 Met. 121; *The State v. Overton*, 4 Zab. 435.

It also seems to us, that the defendant was bound by the contract evidenced by the check set out and punched as it was, not merely to furnish sleeping-car accommodations for the trip, but to furnish the lower berth No. 6, in the particular car No. 96, or at least to furnish an equally desirable berth in the same locality, in another car of equal safety, convenience and comfort.

This is the plain legal effect of the contract. See *The Terre Haute, etc., R. R. Co. v. Fitzgerald*, 47 Ind. 79. .

It was for the particular berth in the car that the plaintiff paid his money. That berth was the one which, by the contract, he was to have. There is, doubtless, some choice in berths; and, whether from mere caprice or from good reason the plaintiff chose and paid for that berth, he was entitled to have it. The defendant could not, without breach of its contract, deprive him of that berth, although it offered to furnish him another, any more than the plaintiff could have claimed another, if he had happened to change his mind and desire another.

This being the legal effect of the contract, we proceed to consider whether any defence is set up in any of the paragraphs of answer. If the defendant furnished the sleeper to be taken through by the railroad companies, and if the failure to take it through was solely the fault of the latter, the contract of the defendant may not have been broken, for, as we have seen, the defendant did not contract for transportation.

By the allegations of the several paragraphs of answer, it does not appear to have been any fault of the railroad companies that the sleeper No. 96 was not taken through

The Pullman Palace Car Co. v. Taylor.

with the train that went on. On the contrary, it is expressly averred in the second and third paragraphs, that the defendant caused the sleeper mentioned to be detached from the train at Pittsburgh. This also is the fair inference from what is alleged in the first paragraph, in which it is averred that "said car No. 96 was left at said city of Pittsburgh, and the defendant was unable to furnish the plaintiff, in either of said other cars, lower berth No. 6," etc.

It clearly enough appears that the defendant failed to furnish the plaintiff with the sleeping car No. 96 beyond Pittsburgh; and that it failed to furnish him beyond that point with a berth in any other car, corresponding with lower berth No. 6 in that car, which it seems the plaintiff was willing to accept. The defendant, therefore, broke its contract with the plaintiff. This breach may have been induced by a desire on the part of the defendant to accommodate a larger number of persons with sleeping-car conveniences; but this can be no legal justification of the breach.

We have been furnished by the appellant with a manuscript opinion in some cases, delivered by Judge BILLINGS of the Circuit Court of the United States for the District of Louisiana, which in some respects, as we think, strongly supports the view we have taken. The principal case was that of *Thomas Simms v. Pullman Southern Car Co.* The plaintiffs had bought sleeping-car tickets from New Orleans to Philadelphia. The train which took the sleeper failed to go beyond Washington, where it stopped on account of riots. The plaintiffs sued for this failure, and there had been a trial and verdict for the defendant. The court said, among other things, in delivering its opinion on a motion for a new trial:

"The court construed the contract into which the defendants entered by the sale of the sleeping-car tickets as follows: That, in the first place, they

The Pullman Palace Car Co. v. Taylor.

obligated themselves to have, throughout the entire line, as indicated upon their tickets, suitable cars to allow an uninterrupted transit. Secondly, that they obligated themselves to have provided such connections between the railroads intervening between the termini and the route indicated upon their tickets, as, according to the regular trains running upon such roads, would permit a continuous transit. Thirdly, that they obligated themselves that these roads were so situated, manned and run, as, according to the regularly established trains, admitted of a continuous passage over the route specified in the tickets which were sold. Fourthly, that they obligated themselves to furnish proper attendance on such cars, and that they would stop with sufficient frequency, and for a sufficient length of time, to allow passengers to take their meals.

“The court further instructed the jury, that, if defendants had shown that they performed these obligations, that they furnished suitable cars, that proper connections over the roads which were operated, so as, from day to day, to have allowed—according to their ordinary trains—a continuous passage, and that, notwithstanding all this, one of the roads, to wit, the Baltimore and Ohio road, refused or failed to send forward any train of cars from Washington to Philadelphia, on account of apprehensions of the riot, and that this refusal or failure was the result of no fault of the defendants, who had an adequate car in readiness to proceed, in that case they had performed all the obligations which they had undertaken, so far as they are connected with the passage of the plaintiffs. The gist of these instructions was, that the contract, on the part of the defendants, was not one for transportation; that that was a distinct contract made between the plaintiffs and the various railroads whose tickets they had purchased, and that the obligations on the part of the

Williams v. Nesbit.

defendants, though connected with the transportation of the plaintiffs, were only such as have been enumerated. * * * I see no reason, after further examination of the case, to change the views which I entertained at the trial."

The appellant has cited, to the point that the special damages claimed by the plaintiff are too remote, the following cases: *Hamlin v. The Great Northern Railway Co.*, 1 H. & N. 408; *Hobbs v. The London, etc., Railway Co.*, L. R., 10 Q. B. 111; *The Indianapolis, etc., R. W. Co. v. Birney*, 71 Ill. 391.

But the plaintiff was entitled to some damages for the breach of the contract; and, as we have seen, no question is properly presented as to the amount recovered.

No error was committed in sustaining the demurrer to the several paragraphs of answer, nor is there any error in the record.

The judgment below is affirmed, with costs.

WILLIAMS v. NESBIT.

PROMISSORY NOTE.—*Complaint by Endorsee Against Endorser.*—*Diligence in Suing Maker.*—In an action by an endorsee, against an endorser, of a promissory note, the complaint alleged, that, immediately on the maturity of the note, at the first term of the court having jurisdiction, the plaintiff sued, procured due service of process on, and obtained judgment against, the maker, on the note.

Held, on demurrer, that the plaintiff used due diligence in suing the maker.

SAME.—*Insolvency.*—*Surplusage.*—Where, in such action, the complaint alleges facts showing due diligence by the plaintiff in suing the maker, obtaining judgment, and issuing an execution which is returned *nulla bona*, any allegation of the insolvency of the maker is mere surplusage.

SAME.—*Dates.*—Such complaint should clearly specify the dates of the judgment and execution.

Williams v. Nesbit.

SAME.—Evidence.—Proceeds of Bankrupt Maker's Estate.—It is not competent for the defendant, under issue formed on such complaint, to prove that the estate of the maker in bankruptcy would pay a percentage of his debts.

SAME.—Judgment.—Execution.—Case Distinguished.—The judgment and execution against the maker are competent evidence against the endorser, and they can not be attacked collaterally. *McCormack v. The First National Bank, etc.*, 58 Ind. 466, distinguished.

PLEADING.—Blanks.—Dates.—Amounts.—The omission, from a pleading, of material dates and amounts is a violation of the rules of good pleading.

SUPREME COURT.—Brief.—Waiver of Error.—Error which is not discussed in the Supreme Court, in the brief of the party assigning it, is waived.

From the Hamilton Circuit Court.

D. Moss, for appellant.

G. H. Voss and W. B. Smith, for appellee.

NIBLACK, J.—This was an action by Joseph Nesbit, as assignee, against Thomas N. Williams, as assignor, of a promissory note executed by William Hartman and Charles W. Heady to the said Williams.

The complaint was in two paragraphs. The first paragraph alleged, that, at the time of the maturity of the note, the makers, Hartman and Heady, were openly and notoriously insolvent; wherefore a suit against them would have been unavailing.

The second paragraph stated, substantially, that, on the 24th day of July, 1874, the said William Hartman and Charles W. Heady, by their promissory note of that date, promised to pay the defendant, in twenty-four months from date, the sum of three hundred and ninety-nine dollars, with ten per cent. interest after maturity and reasonable attorney's fees if suit were instituted on said note, without relief from valuation or appraisement laws; that, after the execution of said note and before the maturity thereof, the defendant transferred said note to the plaintiff by his indorsement, in writing, on the back thereof, in the words following, "Thomas N. Williams;" that, immediately after the maturity of said note, the plaintiff filed a complaint

thereon in the September term, 1876, of the Hamilton Circuit Court, the makers thereof residing at the time in Hamilton county, and that being the first court that commenced after the maturity of said note having jurisdiction over the subject-matter thereof; that such proceedings were had upon said complaint in said court as resulted in a judgment, in proper form, against each of the makers of said note, on the 19th day of September, 1876, for four hundred and two dollars and thirty-five cents, principal and interest, and twenty dollars and fifteen cents, attorney's fees, together with all costs and charges therein laid out and expended, taxed at ——— dollars and ——— cents,—all without relief from valuation or appraisement laws; that the plaintiff thereupon caused execution to issue on said judgment, on the — day of October, 1876, to the sheriff of said county of Hamilton, commanding him to make the amount thereof out of any property belonging either to the said Hartman or Heady in his bailiwick subject to execution; that said sheriff, after making a demand for payment of said execution, and failing to find any property whereon to levy, returned said execution *nulla bona*; that neither of said judgment debtors has any property in this State subject to execution, but both are openly and notoriously insolvent; that the costs of the said suit, amounting to ——— dollars and ——— cents, have been paid by the plaintiff to the proper officers of said court.

The defendant demurred separately to each paragraph of the complaint, but his demurrer was overruled.

Issue being joined, the cause was tried by the court without a jury.

The court, finding for the plaintiff on the second paragraph of the complaint, assessed his damages at four hundred and thirty-nine dollars and ten cents, and, after overruling a motion for a new trial, rendered judgment in his favor upon the finding.

Williams v. Nesbit.

The appellant, the defendant below, has assigned for error the overruling of the demurrer to the second paragraph of the complaint, and the overruling of his motion for a new trial.

As to the alleged insufficiency of the second paragraph of the complaint, the appellant says: "It fails to show—

"1st. Diligence in commencing the suit; or,

"2d. Notorious insolvency at the date of the maturity of the note."

And this constitutes his whole argument against the sufficiency of that paragraph.

The objections, thus urged by the appellant, are not well taken. The allegations of this second paragraph of the complaint, though not so formally made as they might have been, still we think substantially show that suit was commenced on the note, for the September term, 1876, of the Hamilton Circuit Court, the first term of such court after the maturity of the note, and in time to obtain a judgment upon the note at that term. As regards the time of the commencement of the suit, therefore, due diligence was sufficiently shown. *Roberts v. Masters*, 40 Ind. 461. What was said in the second paragraph of the complaint, in relation to the open and notorious insolvency of Hartman and Heady, was mere surplusage, not being germane to the rest of the paragraph, and any other allegation on that subject would have been surplusage for the same reason.

It is unnecessary for us now to say what our ruling might have been, if the objection had been made to the second paragraph of the complaint, that due diligence was not shown in issuing the execution against Hartman and Heady on the judgment obtained against them. It may not be amiss for us to remark, however, that good pleading abhors a blank in a date constituting a part of an essential averment, as much as nature was ever thought to abhor a vac-

um in the material world, and the very frequent practice of leaving blanks in pleadings, when referring to dates and sums, where such dates and sums are material parts of the pleading, can not be too severely reprehended.

It is contended, that, as there was evidence upon the trial tending to show that the estates of Hartman and Heady, in bankruptcy, would be able to pay a per centum, in some amount, upon the debts proved against them, the court erred in finding against the appellant upon his indorsement. But, under the issue tendered by the second paragraph of the complaint, it was immaterial what the bankrupt estates of Hartman and Heady would pay, if any thing. In that paragraph it was alleged that a judgment had been obtained in due time; that an execution on such judgment had been issued with a diligence not complained of by the appellant; and that a return of *nulla bona* had been properly made to the execution. These were sufficient to fix the appellant's liability upon his endorsement, if proved upon the trial, without going into the question whether some other means might have been more effectual.

Upon the trial the judgment against Hartman and Heady, above referred to as obtained in the Hamilton Circuit Court, at its September term, 1876, and the execution issued thereon, were, amongst other things, admitted in evidence, over the objection of the appellant.

As to the admission of that execution in evidence, the appellant, in his brief, says: "The court erred in allowing execution issued on void judgment to be introduced in evidence to excuse the want of diligence," and refers to the case of *McCormack v. The First National Bank of Greensburgh*, 53 Ind. 466. This is the only reference he makes either to the judgment or execution, in his brief. In this reference to the judgment, no objection to its validity is

Vanarsdall *et al.* v. The State, *ex rel.* Watson, Auditor.

pointed out, and hence no question upon its validity is raised here. There is an important difference, at all events, between the case of *McCormack v. The First National Bank of Greensburgh*, *supra*, and the case at bar. That case was a direct proceeding to review the judgment. In this case the appellant seeks to attack the judgment in evidence collaterally only, a much weaker method of attack than a direct proceeding. *Evans v. Ashby*, 22 Ind. 15.

No sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, at the costs of the appellant.

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VANARSDALL ET AL. v. THE STATE, EX REL. WATSON, AUDITOR.

PROMISSORY NOTE AND MORTGAGE.—*Parties.*—*Relator.*—*County Commissioners.*—*County Auditor.*—An action may properly be brought in the name of either the proper board of county commissioners, or of the State on the relation of the proper county auditor, for the foreclosure of a mortgage on real estate, executed to the board of commissioners and their successors, for the use of the county, to secure the payment of a promissory note executed to the county treasurer, for the use of the county.

SAME.—*Power of to Execute, Take or Assign.*—*Ultra Vires.*—The board of commissioners of a county has the right to either execute, receive or assign a promissory note and mortgage necessary to the transaction of its legitimate business.

SAME.—*Note and Mortgage Illegally Assigned.*—*Payment to Assignee.*—*Common School Fund.*—A bona fide payment upon such note and mortgage, made to an endorsee by the debtor, without notice that the endorsee's title is invalid, or that such note and mortgage belong to the school fund, is valid against the county.

From the Montgomery Circuit Court.

P. S. Kennedy, W. T. Brush and E. C. Snyder, for appellants.

G. D. Hurley, B. Crane, S. C. Willson and L. B. Willson, for appellee.

PERKINS, J.—Suit by the appellee against James A. Vanarsdall, Frances A. Vanarsdall, George Vanarsdall, George

Vanarsdall et al. v. The State, ex rel. Watson, Auditor.

S. Davis, John A. Watkins, John Lee and Hugh McCormack, for the foreclosure of the following mortgage, viz.:

"This indenture witnesseth, that James A. Vanarsdall, of Montgomery county in the State of Indiana, mortgages and warrants to the commissioners of Montgomery county, Indiana, and their successors in office, for the use of Montgomery county in the State of Indiana, the following real estate in Montgomery county, in the State of Indiana, to wit, lots number (16) sixteen and (17) seventeen, in block 23, Canby's Addition to Crawfordsville, to secure the payment of the following promissory note:

"\$500. One year after date, I promise to pay to the treasurer of Montgomery county, in the State of Indiana, for the use of said county, the sum of five hundred dollars, for value received, with interest from date, and without any relief from valuation or appraisement laws, this 24th day of June, 1867. JAMES A. VANARSDALL.

"And the mortgagor expressly agrees to pay the sum of money above secured, without any relief from valuation laws.

"Witness my hand and seal this 24th day of June, 1867.

"JAMES A. VANARSDALL. [SEAL.]"

The mortgage was duly acknowledged, stamped, etc.

Persons supposed to have after-acquired interests in the land were made parties.

James and Frances A. and George Vanarsdall demurred to the complaint for want of facts, which demurrer was overruled, and exceptions entered.

McCormack filed a disclaimer, Davis made default, Lee answered, but his answer is not in the transcript, and Watkins was not found.

George and Frances A. Vanarsdall severally answered payment to the assignees and holders of the note and

Vanarsdall et al. v. The State, ex rel. Watson, Auditor.

mortgage, viz., a part of said note and mortgage to Ben. E. Smith, and the remainder to Samuel C. Willson.

A demurrer was overruled to the answer, and the plaintiff replied :

1. The general denial; and,
2. As follows :

“That the note and mortgage, mentioned in the complaint, were executed by said James A. Vanarsdall, to secure the loan of five hundred dollars, from the surplus revenue of said county ; that afterward the board of commissioners of the county of Montgomery, Indiana, for the purpose of aiding in the construction of the Indianapolis, Crawfordsville and Danville Railroad, from Crawfordsville to Indianapolis, donated notes and mortgages to the amount of \$65,895.59, belonging to said county of Montgomery, among which notes and mortgages were the note and mortgage mentioned in the complaint herein ; that said notes and mortgages were placed in the hands of Maj. Isaac C. Elston, Sr., to be by him delivered to the company, upon the performance, by said company, of certain conditions ; a copy of the said order of the said board of commissioners donating said notes and mortgages is filed herewith and made a part hereof, marked ‘Exhibit A ;’ that afterward Maj. Isaac C. Elston, Sr., delivered said note and mortgage to said railroad company, which said company, by her president, Samuel C. Willson, transferred by delivery said note and mortgage to B. E. Smith and associates ; that afterward said B. E. Smith and associates indorsed in blank and delivered said note and mortgage to one Samuel C. Willson ; and plaintiff says, the said order of the board was and is without any authority of law and void, and that the several transfers and assignments of said note and mortgage were also without any authority of law, and null and void, and conferred no title whatever upon the holders thereof.”

Vanarsdall et al. v. The State, ex rel. Watson, Auditor.

The restrictions in the order were upon the paying out of the money, only in proportion to the progress of the work upon the said road.

A demurrer to this paragraph of reply was overruled, the defendant excepted, and refused to reply further; whereupon final judgment was rendered for the plaintiff, for the amount of the note and mortgage and interest.

The Vanarsdalls assign for errors :

1. The court erred in overruling the demurrer to the complaint ;

2. In overruling the demurrer to the second paragraph of reply.

The appellee assigns, as a cross error, the overruling of the demurrer to the answer.

The two principal questions to be decided in this case are :

1. Is the suit maintainable in the name of the State, on the relation of the county auditor ?

2. Are the defendants entitled to be credited with the payments made to the possessors of the note and mortgage ?

As to the first question, section 12 of the act in reference to county auditors is as follows :

"County auditors are authorized to institute suit and prosecute the same to final judgment and execution, in the name of the State, against principals or sureties, or either, upon any note, bond, mortgage, or any obligation, on account of any trust fund, or other fund, whether such note, bond, or mortgage, be in the name of the State or any other person." 1 R. S. 1876, p. 155.

This would seem to authorize the suit as instituted. *Rogers v. Gibson*, 15 Ind. 218. The suit might, without doubt, also have been brought in the name of the Board of Commissioners of Montgomery County. *The Board, etc., v. McIlvain*, 24 Ind. 382.

Vanaredall *et al.* v. The State, *ex rel.* Watson, Auditor.

As to the second question: It has already been decided by this court that the county had no power to make this donation. *Harney v. The Indianapolis, etc., Railroad Co.*, 32 Ind. 244.

This we may concede as a fact; but another and different question is now presented. The question now to be decided is, were the payments, *bona fide*, made by the debtor, on paper so donated, to the wrongful holders of the paper, valid?

In Byles on Bills, sixth edition, p. 343, the law on this subject is stated generally as follows:

"There are some cases in which payment to a wrongful holder is protected, and others in which it is not. If a bill or note, payable to bearer, either originally made so, or become so by an endorsement in blank, be lost or stolen, we have seen that a *bona fide* holder may compel payment. Not only is the payment to a *bona fide* holder protected, but payment to the thief or finder himself will discharge the maker or acceptor, provided such payment were not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. 'For it is a general rule, that where one of two innocent persons must suffer from the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' And supposing the equity of the loser and payer precisely equal, there is no reason why the law should interpose to shift the injury from one innocent man upon another. But, if such a payment be made under suspicious circumstances, or without reasonable caution, or out of the usual course of business, it will not as between all parties and for all purposes discharge the payer."

The question on which the decision of this case must depend is thus shown to be this: Did the payer, when he paid to the holder the note and mortgage in this suit, know,

Vanarsdall *et al.* v. The State, *ex rel.* Watson, Auditor.

or have reason to suppose, that the holder had no right to receive such payment?

The record, it will be observed, discloses nothing of the facts and circumstances under which the payments were made. It shows, simply, that the note and mortgage were paid, a part to Smith, then the holder, and the balance to Willson, at the time the holder. It does not appear, as matter of fact, that the payer at the time of payment knew any thing as to the manner in which, or the purpose for which, the note and mortgage were placed in the hands of said holder.

The mortgage does not show that it was given to secure a loan from the surplus revenue fund, nor does the record disclose that the mortgagor had knowledge of the fact, if such were the fact. The mortgage was overdue when paid. Was the payer bound to know, as matter of law, that the transfer of the note and mortgage was *ultra vires*?

A municipal corporation has the power to receive, as payee, a note and mortgage for a debt lawfully due to such corporation. And it has the right to execute a note and mortgage for a debt lawfully due from such corporation. And it follows logically, that, if the corporation could execute its own note and mortgage to secure a debt, it could assign the note and mortgage of another that it might possess, instead of executing its own.

In short, a municipal corporation may receive, as a creditor, a note and mortgage, may give, as a debtor, a note and mortgage, or may assign those of a third person. *The Board of Commissioners, etc., v. Day*, 19 Ind. 450; *Sturgeon v. The Board of Commissioners of Daviess Co.*, *post*, p. 302, and cases cited. Parsons (1 Notes and Bills, 164,) says:

“Whenever a corporation is authorized to contract a debt, it may draw a bill or give a note in payment of it. Every corporation, therefore, may become a party to bills and notes for some purposes. Thus, a mere religious cor-

Vanarsdall *et al.* v. The State, *ex rel.* Watson, Auditor.

poration may need fuel for its rooms, and as an economical measure may buy a cargo of coal, and give its note for it; and such a note would undoubtedly be valid in this country. So also a bill or note given by a corporation will be presumed to have been given in the course of its legitimate business, until the contrary appears. And a note given by a corporation will, it seems, be valid in the hands of a subsequent indorsee, without notice, whatever may be the purpose for which it was given; and we think it would be valid in the hands of the payee, unless the transaction was clearly fraudulent, and the payee, either from actual knowledge or the nature of the transaction, had notice of it. If, for example, the trustees of Columbia College in New York bought a cargo of cotton, and gave their negotiable note for twenty thousand dollars, the seller might suppose that they had need of some means of transmitting a large amount of money, and found that they could do it to most advantage by using this cotton; or that they wanted it for some other legitimate purpose. Such a note would clearly be valid in the hands of a *bona fide* holder without notice; nor do we think that the nature of the transaction merely would be notice to the original payee that it was given for an unauthorized purpose."

Such being the law, it is very clear, upon the facts of this case, that the maker of the note and mortgage had a right to pay said note and mortgage to the holder or holders, as he did. It does not appear from the record, that the maker knew that Smith or Willson held the note and mortgage otherwise than in their individual capacity, nor that they were executed to secure a loan from any particular fund.

Here we might stop. We have presented the case just as the facts in the record make it, and upon which it must be decided. But, as the case may probably be tried again, when further facts may be disclosed, we submit an author-

Vanarsdall *et al.* v. The State, *ex rel.* Watson, Auditor.

ity and an observation upon other points we are not now called upon to decide.

In *Moss v. Rossie Lead Mining Co.*, 5 Hill, 137, it was held, that, if an incorporated company purchase property and convert it to their own use, they will not be permitted to defeat a recovery for the price, by showing that the purchase, on account of the nature of some of the property, was probably, though not necessarily, an abuse of the powers granted by their charter; otherwise, if the vendor was apprised at the time of the sale, that the company were acting in violation of their charter." 1 Parsons Notes & Bills, 165, note.

Could the appellee in this case, the plaintiff below, set up her own illegal act, if it were such, of which the appellants are not shown to have had any knowledge, to avoid the payment of the note and mortgage to the holders thereof, with whom the plaintiff had left them for the purpose of receiving payment?

Again: Suppose it should turn out, upon another trial, that the loan, for which the note and mortgage were given, was made from the surplus revenue fund, still the money may be regarded as the money of the county, donated, it is true, to a particular purpose. That portion of the school fund denominated the surplus revenue originated in a deposit made nearly half a century ago by the United States, with the State, of her proportionate share of the surplus revenue, then in the treasury of the United States, growing out of the enormous sales, at that period, of the public lands. Though nominally a deposit, it was, at the time, generally regarded as a gift, and practically it was. Its return has never been demanded, and never will be. No greater financial exigency, necessitating its recall, than has occurred, will occur. The State, by her constitution, has permanently incorporated it with her school fund, distributed it among the counties, and, by section 6 of the 8th article of that instrument, has ordained, that,—

Charles, Administrator, *et al.* v. Malott.

"The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them, and for the payment of the annual interest thereon." *Baker v. The Board, etc., of Washington Co.*, 53 Ind. 497; *Driskill v. The Board, etc., of Washington Co.*, 53 Ind. 532; *Rock v. Stinger*, 36 Ind. 346.

The judgment is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

CHARLES, ADMINISTRATOR, ET AL. v. MALOTT.

NEW TRIAL.—*May be Granted more than Twice.*—Section 852 of the practice act does not prohibit the granting of another new trial to a party who, once for an erroneous ruling upon a demurrer to a pleading, and again for other reasons, has twice had a new trial of the same cause.

WITNESS.—*Conversation with Decedent.*—*Replevin.*—Where a co-plaintiff in an action of replevin dies without having made a deposition, and his administrator is substituted as a co-plaintiff, the defendant is not a competent witness, in his own behalf and on his own motion, to testify to a conversation had between himself and the decedent, in relation to the title to the property in controversy.

From the Grant Circuit Court.

I. VanDevanter and *J. W. Lacey*, for appellants.

J. Brownlee and *H. Brownlee*, for appellee.

Howk, J.—In this action, Job S., Jonathan and Owen Mills, as plaintiffs, sued the appellee and one John Jones, sheriff of Grant county, as defendants, to recover the possession of one portable saw-mill, of the Eagle Machine Works, and all fixtures thereto belonging, of the alleged value of three thousand dollars.

The complaint was filed on the 18th day of February, 1871, and it was alleged therein, that the plaintiffs were the owners, and entitled to the possession, of said saw-mill, of the value aforesaid, of which the appellee and said

Charles, Administrator, *et al.* v. Malott.

Jones had possession without right, and unlawfully detained from the said plaintiffs. Wherefore, etc.

This is the third time the cause has been appealed to this court. When it was first here, the decision and opinion of the court may be found under the title of *Mills v. Malott*, 43 Ind. 248; and the second time it was reported under its present title of *Charles, Adm'r, v. Malott*, 51 Ind. 350.

The appellee answered in three paragraphs, of which the first was a general denial, and each of the other two paragraphs set up affirmative matters, by way of defence. To the second and third paragraphs of answer, the appellants replied by a general denial. The issues joined were tried by a jury, and a verdict was returned for the appellee, finding the value of the property in controversy to be two thousand dollars, and the undivided one-half of said property to be worth one thousand dollars.

The appellants' motion for a new trial was overruled, and their exception was entered to this ruling, and judgment was rendered on the verdict.

The overruling of their motion for a new trial is the only error assigned by the appellants in this court. The causes for such new trial were as follows:

1. The verdict was not sustained by sufficient evidence;
2. The verdict was contrary to law;
3. Error of the court in admitting the evidence of the appellee, Malott, as to the statements of Job S. Mills, deceased, whose administrator was a party plaintiff; and,
4. The court erred in admitting the evidence of the appellee, Malott.

Before we consider the questions arising under the alleged error assigned by the appellants, it is proper that we should dispose of a motion, filed by the appellee in this court, to dismiss the appeal of this cause. The reason assigned by the appellee, in support of his motion to dis-

Charles, Administrator, et al. v. Malott.

miss is, "that the appellants were not entitled to another trial, the cause having been tried three times, and the issues and verdicts having been the same" on each trial.

In section 352 of the practice act it is provided, among other things, that "not more than two new trials shall be granted to the same party in the same cause." 2 R. S. 1876, pp. 179 to 182. In the case of *Shirts v. Irons*, 47 Ind. 445 the above quoted provision of the practice act was very carefully considered by this court, and the following construction was placed thereon :

"We think the true rule is, that where two new trials have been granted in the same cause to the same party, either by the court below or by this court, exclusively for any of the reasons specified in section 352, another new trial cannot be granted to the same party in such cause for any of the reasons specified in said section; but that this court may reverse a judgment for the erroneous rulings of the court below on the pleadings, or other matters which do not constitute reasons for a new trial, although such reversal may result in another trial in the court below upon the merits of the case."

The rule thus declared and laid down, as and for a proper construction of the statutory provision above quoted, limiting the number of new trials which a party may fairly have in civil actions, was fully recognized and approved by this court in the more recent case of *Headrick v. Wisheart*, 57 Ind. 129.

Applying the rule thus laid down to the case at bar, and the new trials granted therein as shown by the reports of this case in 43 Ind. 248, and in 51 Ind. 350, it will be readily seen, we think, that the appellants have had only one new trial of this cause, "exclusively for any of the reasons specified in section 352." Indeed, it is apparent from the opinion of this court in 51 Ind. 350, that the judgment was then reversed, and a new trial was awarded,

Charles, Administrator, *et al.* v. Malott.

solely and exclusively for an error of the court in overruling a demurrer to the fourth paragraph of the answer, and not for any of the reasons specified in said section 852 of the practice act. The appellee's motion to dismiss the appeal in this case is not well taken, and must therefore be overruled.

We pass now to the consideration of the error assigned by the appellant on the record of this cause, in this court.

The third and fourth causes for a new trial present the grounds upon which the appellants rely for a reversal of the judgment of the court below. These grounds are, that the court erred in permitting the appellee, Malott, to testify as a witness in his own behalf, as to any matters which occurred prior to the death of Job S. Mills, deceased, whose administrator, Joel Charles, was a party plaintiff in this action, and especially as to any statements by, or conversations with, said Job S. Mills, deceased, in his lifetime.

In the first *proviso* in section 2 of "An act defining who shall be competent witnesses in any court or judicial proceeding in this State," etc., approved March 11th, 1867, it is provided, "That in all suits where an * administrator * * is a party in a case, where a judgment may render either for or against the estate represented by such * administrator, * * neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause, except in cases arising upon contracts made with the * administrator * * of such estate," and except in cases where the deposition of a party has been taken and filed, and the party dies before the suit is determined, etc., 2 R. S. 1876, pp. 133 and 134.

The appellee's evidence, which the appellants objected to, was material. He testified to certain conversations between himself, the appellee, and the decedent, Job S. Mills, in the latter's lifetime, which tended to show that, by the procurement of said Job S. Mills, acting for

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

himself and his brothers, the said Jonathan and Owen Mills, the appellee had purchased and paid for one-half of the property in controversy, upon the faith of an agreement with the said Job S., for himself and his said brothers, that they would release their claims on the said one-half of said property, so purchased by the appellee. The appellee was not required to testify as a witness either by the appellants or by the court trying the cause, and the case did not fall within either of the exceptions stated in the statute. It seems to us that the appellee was an incompetent witness as to his conversation with Job S. Mills, deceased, and that his evidence, as to those conversations, ought not to have been admitted, over the appellants' objections. *Jenks v. Opp*, 43 Ind. 108; *Ginn v. Collins*, 43 Ind. 271; *Hoadley v. Hadley*, 48 Ind. 452.

For the reasons given, the court erred, we think, in overruling the appellants' motion for a new trial of this cause.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellants' motion for a new trial, and for further proceedings.

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| 132 | 142 |

THE PITTSBURGH, CINCINNATI AND ST. LOUIS R. W. Co. v.
HOLLOWELL.

COMMON CARRIER.—*Contract.*—*Consideration.*—*Complaint for Failure to Receive and Carry.*—A complaint against a railroad company alleged a breach, by the defendant, of an agreement between the plaintiff and the defendant, whereby the latter agreed to ship certain live-stock which the plaintiff agreed, and attempted, to deliver to the defendant for shipment. *Held*, that the agreement was based upon a sufficient consideration.

SAME.—*Rule for Non-Delivery not the same as for Failure to Receive.*—The rule of law, as to the liability of a common carrier for a failure to deliver goods which have been entrusted to it for transportation and delivery, is not applicable, with the same degree of strictness, for unavoidable delay in receiving and carrying.

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

SAME.—Answer.—Insurrection.—Riot.—Strike.—In an action against a common carrier, for delay in receiving and carrying live-stock which it had agreed to receive and carry, the defendant answered that such delay was caused, not by the negligence of the defendant or its agents, but solely by reason of the fact, that, though the defendant was prepared to receive and carry the goods, an armed multitude of people in rebellion against the laws of the State, which neither the defendant nor the civil authority of the State was able to control, by force and arms drove away the engineers, and firemen operating the defendant's engines and cars, and thus prevented the defendant from receiving and carrying the plaintiff's live-stock.

Held, on demurrer, that the answer is sufficient.

SAME.—Reply.—A reply, in such case, alleging that the cause of such pretended insurrection was an unjust and oppressive reduction by the defendant of the wages of its employees, which induced them to strike and refuse to work, and to assemble in a peaceable body to demand a restoration of their former rate of wages, but without offering any resistance to the civil authorities, is insufficient.

SAME.—A reply alleging that such alleged insurrection was composed solely of employees of the defendant, who, peaceably and without arms or violence, and on account of an unjust and oppressive reduction by the defendant of their wages, refused to continue in the defendant's employ until their former rate of wages was restored, and who had peaceably assembled in a small body to petition therefor, is insufficient. **BIDDLE, J.**, dissents on this point.

From the Madison Circuit Court.

N. O. Ross and *H. D. Thompson*, for appellant.

H. C. Allen and *C. L. Henry* for appellee.

BIDDLE, J.—Complaint by appellee, as a shipper, against the appellant, as a common carrier, to recover damages for delay in receiving and transporting live-stock. The complaint originally contained three paragraphs, but the second one was withdrawn; the case, therefore, stands upon the first and third paragraphs. A demurrer, for the alleged want of facts, was overruled to each paragraph of the complaint. The appellant answered by a general denial, and six special paragraphs, numbered from one to seven inclusive. Demurrers were overruled to the second, third, fourth, fifth, sixth and seventh paragraphs. Reply in three paragraphs, to the second and third of which demurrers were overruled. Trial by the court, and finding

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

for the appellee. Motion for a new trial overruled. The appellant excepted to the various rulings of the court. Judgment on the finding, and appeal.

The second paragraph of answer was in the following words :

“ For a second and further answer to the first and third paragraphs of complaint, the defendant says, that, during the entire time of the delay in shipping the plaintiff's stock, as charged in said paragraphs of the complaint, a portion of the citizens of the State of Indiana were in rebellion against the laws and government of said State, and assembled together along the line of the defendant's railroad, over which it was necessary to pass to carry said stock to the place of its destination, to wit, East Liberty, Pennsylvania, with clubs, stones, pistols and other dangerous weapons, and with the use of force, threats and intimidation, drove the defendant's locomotive engineers, firemen, and other servants necessary to run a train, away from the defendant's trains, then ready and prepared to transport the plaintiff's hogs at the time agreed on ; and that said persons, so in open rebellion and armed as aforesaid, during all said delay, to wit, from said 26th day of December, 1873, until said 3d day of January, 1874, continued to assemble themselves together along the line of railroad as aforesaid, and with force and violence drove away from the engines and trains of defendant the engineers and firemen employed by the defendant to operate its trains ; and that the persons so in rebellion, and resisting the laws of the State of Indiana, and resisting the defendant in the lawful operations of its said railroad, were so numerous that the civil authorities of the State were unable to resist and suppress them ; and that it became necessary for the Governor of the State of Indiana to call out the military force of the State to suppress them ; and that he did call out said military force, and suppressed said rebellion, on the 2d day of January, 1874 ; and that the

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

defendant, as soon thereafter as it was possible to do so, to wit, on the 3d day of January, 1874, sent a proper train of cars to where said stock was to be reshipped from, and without further delay transported said stock to their place of destination. Wherefore the defendant says, it was prevented by the enemies of the government, in open rebellion, from transporting the plaintiff's hogs sooner than it did transport them as alleged in the complaint."

The third, fifth, sixth and seventh paragraphs of answer set up substantially the same facts as those averred in the second. The fourth paragraph was withdrawn.

The second paragraph of reply was pleaded to the second, third, fifth, sixth and seventh paragraphs of answer. It averred that the pretended rebellion, set up in the defendant's answer, was caused by a reduction of the wages of the engineers, firemen and employees of the defendant, which induced them to strike, or refuse to go to work; that they assembled peacefully, in a body, and demanded their wages restored, but neither offered nor threatened any resistance to the civil authorities of the State.

The third paragraph of reply is in the following words:

"And for third and further reply to the second, third, fifth, sixth and seventh paragraphs of defendant's answer, he says, that all the obstruction and disturbance that occurred, as set out in said answer, were caused by an unjust and oppressive order of said defendant, in cutting down and reducing the wages of her engineers, firemen and employees, and thus causing the said employees to refuse to work, and become sullen and turbulent; and that said employees assembled in a small body, and demanded a revocation of said order, and a restoration of their former wages; and that none but the employees of this defendant engaged in any way in said disturbance."

Upon the issues thus settled, the case was tried.

The only objection made to the complaint is, that it does not aver any consideration for the contract to ship the

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

stock, but it shows the relation of common carrier and shipper between the parties, and an agreement on the part of the appellee to furnish to appellant stock to be shipped, and on the part of the appellant to ship the stock, and that the stock was furnished at the proper depots, and a part of it loaded upon the appellant's cars. These facts show the contract, and a sufficient consideration to support it. We think the complaint is good. *The Pittsburgh, etc., R. W. Co. v. Morton*, 61 Ind. 539.

The appellee insists, that it is immaterial whether his second and third replies to the appellant's answer are good or not, because, as he also insists, the paragraphs of answer to which they were pleaded, are not good.

It is generally held, that, to excuse a common carrier, the loss must happen from a strictly superior force, not merely human, unless it be the public enemy, the *vis major* of the civil law. Redfield Carriers, sec. 25. But the carrier will be exempted from losses caused by public enemies, as by a hostile invasion and seizure or destruction of property, or by the capture of the carrier's vessel and cargo on the high seas by the men of war or commissioned privateers of the nations with which we are in open war.

"To make a public enemy, the government of the foreign country must be at war with the United States; for a mob, how numerous soever it may be, or robbers, whoever they may be, are never considered as a public enemy." Bouv. Dict., tit. Public Enemy.

Rioters and robbers and thieves and insurrectionists, though at war with social order, are not in this sense classed as public enemies. Though the force by which the carrier be opposed be never so great, as if an irresistible multitude of people should rob him, he is nevertheless chargeable.

Pirates upon the high seas, however, stand as an exception to this rule. They are considered the enemies of all civilized nations, and indeed of the human race, whose

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

depredations upon a common carrier will excuse him from liability. Edwards Bailments, 463. The carrier is answerable for loss caused by the irresistible force and violence of robbers and mobs; and thieves, rioters, insurgents, who are merely private depredators, are not considered public enemies in the legal sense of the term. Angell Carriers, secs. 191, 200.

It has long been settled in England, that a common carrier is responsible for all losses, except such as are occasioned (to speak in the quaint language of the common law) "by the act of God or the King's enemies." The true reason is given by SIR WILLIAM JONES, namely, that the carrier's engagement is a public employment, which gives him easy facilities, and affords great temptations, to combine secretly with robbers to the infinite mischief of commerce, and extreme inconvenience to society. To which reasons may be added, that, when goods are delivered to a carrier, they are no longer under the control of the owner. If they should be lost by the grossest carelessness of the carrier, or negligence and dishonesty of his servants, or be stolen by thieves in collusion with them, the owner would be unable to prove the facts, except by those who had committed the wrong, and who would thus be strongly tempted to excuse their master as well as themselves. Angell Carriers, secs. 149, 150, 191, 200.

The law against common carriers, where the goods are lost, seems severe, but its severity is necessary to the security of property, and the protection of commerce, and is founded in experience and the deepest wisdom.

The first case we find reported was under CHARLES II. It is this: The carrier loaded his vessel in the river Thames, for Cadiz, in Spain. She was manned by five sailors, which was sufficient to sail her. In the night-time came eleven

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

persons, under pretence of pressing seamen for the King's service, and by force seized the sailors and took the goods. The case was compounded upon a final decision, but "it was agreed on all hands that the master should have answered, in case there had been any default in him or his mariners." *Morse v. Slue*, Ventris, 190.

The first case reported in this State is *Walpole v. Bridges*, 5 Blackf. 222, wherein Dewey, J., gives a construction to the phrase, "Act of God," but does not define a public enemy. In this case, it was held that the exception in a bill of lading, "unavoidable dangers and accidents of the road only excepted," did not restrict the general liability of a common carrier. The following cases support this view more or less directly: *Proprietors of the Trent Navigation v. Wood*, 3 Esp. 127; *Lane v. Cotton*, 1 Ld. Raym. 646, 652; *Bell v. Reed*, 4 Binney, 127; *Murphy v. Staton*, 3 Munf. 239; *Ewart v. Street*, 2 Bailey, 157; *McArthur v. Sears*, 21 Wend. 190; *Blackstock v. The New York and Erie R. R. Co.*, 1 Bosworth, 77.

But the strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation, and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence can not provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob.

Under this view, we think the second, third, fifth, sixth and seventh paragraphs of the appellant's answer are each

The Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Hollowell.

sufficient. *The Pittsburgh, etc., R. W. Co. v. Morton*, 61 Ind. 539.

The appellant insists, that the second and third paragraphs of the reply to its answer are both insufficient. As to the second paragraph, we think this view is correct. The fact that a railroad company has reduced the wages of its employees can not be held to justify or excuse a mob, composed of indiscriminate persons, in stopping a train of cars, and delaying the receiving of goods, or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings, when they cause such delay.

A majority of the court also hold the third paragraph of reply insufficient. They think that a fair construction of its averments means no more than that the employees committed the acts alleged against them in the reply, after they had refused to work for the company, and thus had severed their relations with the road, and had therefore ceased to be its employees.

If this is the fair construction of the reply, it is insufficient; but the writer of this opinion is constrained to differ from the majority of the court on this point. He can not see how the language of the averments can fairly bear such a construction. The persons alleged to have created the disturbance and caused the delay are averred, throughout the reply, to be the employees of the appellant, and the concluding sentence, which must be taken as referring to what precedes it, clearly avers "that none but the employees of the defendant engaged in any way in said disturbance." The reply, as the writer construes it, puts the fact whether the persons causing the delay complained of were the employees of the appellant or not, directly in issue, and, as it was thus presented to the court for trial and found against the appellant, that, therefore, the judgment ought to be affirmed; for it is a well settled principle

Anderson *et al.* v. Anderson.

of law that a delay caused by a "strike," or a mob, composed solely of the employees of a railroad company, as averred in the reply before us, will not excuse the company from receiving and carrying freight according to its contract or public duty. *Redfield Carriers*, sec. 28; *Edwards Bailments*, sec. 609; *Conger v. The Hudson River R. R. Co.*, 6 Duer, 375; *Parsons v. Hardy*, 14 Wend. 215; *Blackstock v. The New York and Erie R. R. Co.*, 20 N. Y. 48; *Condict v. The Grand Trunk R. W. Co.*, 54 N. Y. 500.

For the error in overruling the demurrer to the third paragraph of reply, the judgment must be reversed.

Other points not herein examined are presented by the record, but as it is scarcely possible that they will arise again, and as the law issues are now settled, we may be excused from deciding any other questions in the case.

The judgment is reversed, at the costs of the appellee; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings according to this opinion.

ANDERSON ET AL. v. ANDERSON.

REVIEW OF JUDGMENT.—*Complaint.*—*Partition upon Award of Arbitrators.*—*Arbitration and Umpirage.*—In an action for the review of a judgment rendered in an action for partition, it appeared affirmatively by the record filed with the complaint for review, that the judgment sought to be reviewed had been rendered, over a demurrer for insufficiency and an exception, on a paragraph of the complaint for partition, counting upon a statutory award by arbitrators; but it did not appear by the record that the award and agreement of submission had ever been filed in the court named in such submission, nor that the submission and award had been proved, nor that proof had been made of due service of a copy of the award, nor that the proper court had caused such submission and award to be entered of record, and had granted a rule to show cause why judgment

Anderson et al. v. Anderson.

should not be rendered upon the award, nor that the award had ever been confirmed by the judgment of the proper court.

Held, on demurrer to the complaint for review, that it is sufficient, that such paragraph of the complaint for partition was insufficient, and therefore that the judgment rendered thereon should be reviewed and reversed.

From the Franklin Circuit Court.

B. L. Smith, G. B. Sleeth and J. W. Study, for appellants.
W. M. McCarty and F. J. Hall, for appellee.

Howe, J.—In this action the appellants sued the appellee, in a complaint of a single paragraph, to obtain a review of a former judgment of the court below, in favor of the appellee and against the appellants, for alleged errors of law appearing in the proceedings and judgment. The appellee demurred to the appellants' complaint, upon the following grounds of objection, to wit :

1. That the complaint did not state facts sufficient to constitute a cause of action ;
2. For a defect of parties plaintiffs.

This demurrer was sustained by the court, and to this decision the appellants excepted, and judgment was rendered on the demurrer, in favor of the appellee and against the appellants, for the costs of this suit, from which judgment this appeal is now prosecuted.

In this court the only error assigned by the appellants is the decision of the circuit court, in sustaining the appellee's demurrer to their complaint.

In this complaint the appellants alleged, in substance, that, on the 23d day of August, 1876, the appellee filed her complaint, in three paragraphs, against the appellants in the court below, the first two paragraphs of which set forth, in substance, that, on the 1st day of January, 1874, Joseph Anderson died in Franklin county, Indiana, seized in fee of the real estate therein described, and leaving as his only heirs at law, the appellee, his widow, and the appellants, his children and grandchildren, and charging

Anderson et al. v. Anderson.

that certain advancements had been made to certain of the appellants, and praying partition of said real estate, and that said advancements might be considered in making such partition; that the third paragraph of said complaint stated, in substance, that Joseph G. Anderson died January 1st, 1874, seized in fee of the real estate therein described, leaving as his only heirs the appellee and the appellants, and that the appellee and the appellants entered into a bond, made part of said paragraph, agreeing to refer all matters in dispute to the arbitrament and award of Charles Miller, Thomas Scott and James H. Moore, and that their award should be made a rule of the Franklin Circuit Court; that said arbitrators met and qualified, and, after hearing evidence, awarded to the appellee in fee certain lands therein described, and making a copy of the award a part of said paragraph, and setting forth that the appellants had not conveyed said lands to the appellee, and asking that they be ordered and decreed to convey said lands to her, the appellee, and averring that she had performed all conditions of said award, and asking that the award be made a rule of the court. And the appellants further averred, that a summons was issued and served on all of the appellants, except Jeremy H. Anderson, on or before August 21st, 1876, and publication was made as to said Jeremy H. Anderson prior to the last named date, and that, on September 6th, 1876, being the third juridical day of the September term, 1876, of the court below, the following proceedings were had in said cause; that the appellants, then defendants, were all defaulted and a judgment, in substance as follows, was rendered: That the complaint should be taken as true, that the award of the arbitrators be made a rule of the court, and that the appellants convey the lands awarded to the appellee, and, on default so to do, that the judgment should vest all the right, title and interest of the appellants, then defendants, in, to and over said

lands, in the appellee, her heirs and assigns forever, and stand for a deed, and a judgment for costs. The appellants further said, that, at the same term of the court, on the 8th day of September, 1876, the fifth juridical day of said term, they filed their motion to set aside the default and judgment theretofore taken against them, which motion was overruled; that thereupon the appellants, then defendants, moved the court for a new trial of said cause, upon the payment of costs, and the court overruled said motion, to each of which rulings of the court the appellants at the time excepted, and filed their bill of exceptions. The appellants filed a full, complete and correct transcript of all the proceedings in said cause, with their complaint in this case, and made the same a part thereof. The appellants prayed that the proceedings and judgment set forth in their complaint might be reviewed, vacated, set aside or modified, for the following reasons:

1. Because the finding and judgment of the court, on the first and second paragraphs of the complaint, could only have been an interlocutory judgment for partition of the lands therein described, and the appointment of commissioners to make such partition; or there should have been a finding and judgment that said lands were not susceptible of division.

2. Because the court acquired no jurisdiction of the subject-matter of the cause of action set forth in the third paragraph of the complaint, said cause of action being a statutory award of arbitrators, and no proof having been made or filed that said award or a copy had been served on the appellants, then defendants, said award not having been entered of record, and no rule of court having been granted or issued against or served upon any of the appellants, to show cause why judgment should not be rendered upon said award.

3. Because no rule of the court below was served upon

Anderson et al. v. Anderson.

the appellants ten days prior to the rendition of the judgment making said award absolute.

4. Because the third paragraph of the complaint did not state facts sufficient to constitute a cause of action.

5. Because neither the findings nor judgment of the court show that any proof whatever was introduced to sustain any of the allegations of the complaint.

6. Because the third paragraph of the complaint, the only one upon which the judgment rendered was based, did not authorize, nor did its allegations warrant, a finding or judgment that the appellee was either awarded, or was the owner of, the one-third or any portion in fee of the lands described in the third paragraph of her complaint, for her heirs and assigns forever; but, on the contrary, the third paragraph of the complaint, and the exhibits made part thereof, showed the same to have been set apart to her for her use during life.

7. Because the third paragraph of the complaint showed, that the pretended arbitration was held by the arbitrators therein named, who assumed, and by their award undertook, to determine the claim of the parties to the arbitration, to the fee of the real estate therein described; the appellee having been the second wife of the Joseph G. Anderson named in the complaint, and having no children by him, and he having at his death children by a former wife. Said arbitration and the action of the arbitrators were therefore null and void, and unauthorized by law, and could have no binding force or effect whatever.

8. Because the court arbitrarily refused to set aside the default and judgment two days after the rendition thereof, upon the appellants' motion supported by affidavits.

9. Because the court, by its decree and judgment, ordered and directed the appellants to convey the lands described in the third paragraph of appellee's complaint to the appellee; she not having averred a tender of a deed to

the appellants, and having filed no deed to them, of any of the lands described in her complaint, her action was therefore prematurely brought.

10. Because the court refused to grant the appellants, then defendants, a new trial upon their motion, upon the payment of all costs in said proceeding. Wherefore, etc.

With their complaint for review, the appellants filed a complete transcript of the proceedings and judgment, which they sought to have reviewed in this action. It is evident from this transcript, that, in the third paragraph of her complaint, the appellee counted upon a statutory award, made by certain arbitrators to whom the appellants and the appellee had submitted "all differences, damages, claims and demands whatsoever, either in law or equity," then existing between them. It is apparent also, from the judgment in said cause, set out in said transcript, that it was rendered upon the third paragraph of the complaint, and for the enforcement of the award sued on therein. It did not appear, however, from the transcript of the proceedings and judgment, made part of the third paragraph of the appellee's complaint in the original suit, that the award and the agreement of submission had ever been filed in the court named in such submission, as provided in section 12 of "An act relative to arbitrations and umpirages," approved February 3d, 1852. 2 R. S. 1876, p. 320. Nor did it appear from said transcript, that the submission and award had been proved, nor that proof had been made of the due service of a copy of the award on the appellants. Nor did it appear that the court had caused such submission and award to be entered of record, and had granted a rule thereon against the appellants to show cause why judgment should not be rendered by the court upon said award, as provided in section 13 of the above entitled act. *Supra*. Nor did the said transcript show that the award in suit had ever been confirmed by the

Anderson *et al.* v. Anderson.

judgment of the court below, as required by the provisions of the statute.

In the case of *Shroyer v. Bash*, 57 Ind. 349, in construing the provisions of the above entitled act relative to arbitrations and umpirages, we said :

“ Under these provisions, it is clear to our minds, that a statutory award must be regarded as merely *in fieri*, until it has the sanction of, and is confirmed by, the proper court on the hearing, in the proceeding provided by the statute for that purpose. Until such confirmation of the award, it is imperfect and incomplete, and may or may not be a valid award. The award, called for by the provisions of our statute, is an award confirmed by the proper court, in a proper proceeding for that purpose; and this is the award, which the parties execute bonds with condition to abide by and faithfully perform. In our opinion, under a fair construction of the entire statute, an action can not, and ought not to, be maintained on a statutory arbitration bond, for the enforcement of the award, until such award, in a proper proceeding for that purpose, has been confirmed by the judgment of the proper court.”

In the case of *Boots v. Canine*, 58 Ind. 450, it was held by this court, that an action would not lie upon a statutory award, “ until, in a proper proceeding for that purpose under the statute, the award had been confirmed by the judgment of the proper court. For, until such judgment of confirmation, a statutory award is incomplete and imperfect.” See, also, on the point now under consideration, the case of *Martin v. Bevan*, 58 Ind. 282.

It is admitted by the appellee’s counsel, in their argument of this cause in this court, that the judgment or decree in the original suit “ was founded on the third paragraph ” of the appellee’s complaint, in which it was “ simply sought, as at common law, to enforce performance ” of the award, “ and not under the statute.” The appellee’s counsel, in their brief of this cause, further say :

"No rule of court was served—we asked for none, wanted none; we alleged partition (by arbitration), notice of it to parties, compliance with the award by us, a default by them, and asked that they be compelled to comply by executing deeds, or, on default, the decree stand for title in severalty of the land assigned to the plaintiff below."

These admissions of the appellee's counsel show very clearly, we think, that the appellee, in the enforcement of the award made part of the third paragraph of her complaint, did not intend to be governed, and was not governed, by the provisions and requirements of the statute; for, if either of the parties to a statutory award shall fail or refuse to comply with the award, and the other party shall desire to enforce the same, the statute imperatively requires, that such other party shall ask for a rule from the proper court, against the party failing or refusing to comply with the award; that the court shall grant the rule; that, "If the rule has been served ten days or more on the adverse party before the time set for showing cause against the award, the court may proceed to examine and determine the same in his absence; or if he appear they shall proceed to hear and determine the grounds alleged against such award, if there be any;" and that, upon such hearing, "the court shall confirm the award and render judgment thereon, unless the award be vacated, or modified, or postponed," as provided in the statute, "which judgment shall have the same force and effect as judgments in other cases."

2 R. S. 1876, pp. 320, 321.

It is very clear, therefore, as it seems to us, that there is "error of law appearing in the proceedings and judgment" which the appellants seek to have reviewed in their complaint in this action, in this: That the said third paragraph of the appellee's complaint, in the original cause, upon which paragraph alone, it is admitted, the said judgment was founded, did not state facts sufficient to constitute a

Johnson v. The State.

cause of action against the appellants, or either of them, or to authorize or justify the court in the rendition of said judgment.

There were, perhaps, other errors of law appearing in said proceedings and judgment, as alleged by the appellants; but this we do not decide. The error of law, which we have considered and passed upon, was amply sufficient to sustain the appellants' complaint, in this action, and to entitle them to the review and reversal of the judgment in the original cause.

We are clearly of the opinion, that the court below erred in sustaining the appellee's demurrer to the appellants' complaint.

Since the record of this cause was filed in this court, and before the submission of the case, it was suggested that the appellee had died intestate; and thereupon, on the appellants' motion, the heirs at law of the appellee, to wit, Naomi Adams and others, were substituted as appellees, and duly notified of the pendency of this appeal.

The judgment is reversed, at the costs of the heirs at law of the appellee, now deceased, and the cause is remanded, with instructions to overrule the appellee's demurrer to the appellants' complaint, and for further proceedings, in accordance with this opinion.

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JOHNSON v. THE STATE.

CRIMINAL LAW.—*Indictment for Arson.—Burning Property Insured.—Corporate Existence, and Name, of Insurance Company.*—An indictment for arson, charging the burning of property insured against loss by fire by an insurance company designated by a name apparently indicating it to be a corporation, need not affirmatively aver its corporate existence, nor whether it is a domestic or foreign corporation.

Johnson v. The State.

SAME.—Evidence.—Foreign Insurance Company.—Non-Compliance of, with Statute.—An insurance policy issued by such company, on such property, is admissible in evidence, on the trial in such case, without proof either of the corporate existence of the company, or that the company, which was a foreign corporation, had complied with the requirements of the act of December 21st, 1865, 1 R. S. 1876, p. 594, "regulating foreign insurance companies doing business in this State," etc.

SAME.—Purchase, after Fire, of Part of Insured Property, from Wife of Co-Defendant.—A witness in such case having testified that he and one indicted jointly with the defendant, at the solicitation of the latter, and on his promise to them that the codefendant could have all of the goods insured which he could carry away, had set the insured property on fire, it was proper to permit evidence of witnesses, that, after the fire, they had purchased, of the wife and at the house of the codefendant, goods of the character of those insured.

From the Owen Circuit Court.

H. Richards, A. W. Fullerton, A. T. Rose, E. Short, E. E. Rose and S. M. McGregor, for appellant.

T. W. Woollen, Attorney General, *S. O. Pickens*, Prosecuting Attorney, *W. M. Franklin, I. H. Fowler and W. Hickam*, for the State.

NIBLACK, J.—The appellant, Isaac E. Johnson, was indicted jointly with one William F. Johnson, for the crime of arson.

The indictment contained two counts.

The first count charged the defendants with burning a stock of drugs, medicines, groceries and other merchandise, the property of the said Isaac E. Johnson, upon which a policy of insurance against loss or damage by fire had been issued by the Phoenix Insurance Company of Brooklyn, with intent to defraud said insurance company.

The second count charged the defendants with burning a frame storehouse, the property of one Finley B. Johnson, together with the said stock of drugs, medicines, groceries, and other merchandise of the said Isaac E. Johnson, all of which property was insured against loss or damage by fire by the said Phoenix Insurance Company of

Johnson v. The State.

Brooklyn, with the like intention of defrauding such insurance company.

The appellant moved to quash both counts of the indictment, but his motion was overruled.

A separate trial being ordered, the cause, as to the appellant, was tried by a jury, who returned a verdict of guilty on both counts of the indictment, fixing his punishment at a fine of one hundred dollars, and imprisonment in the state-prison for eighteen months. After considering and overruling a motion for a new trial, the court rendered judgment upon the verdict.

The first question here arises upon the sufficiency of the indictment.

It is objected that the indictment was bad for not showing whether the Phoenix Insurance Company was a domestic or foreign corporation; that, if a domestic corporation, it ought to have been alleged to have been duly organized under the laws of this State; or, if a foreign corporation, that such corporation had complied with the act regulating foreign insurance companies doing business in this State. 1 R. S. 1876, p. 594.

We think it fairly deducible from the authorities, that, when an ideality is referred to in a pleading by a name such as is usual in creating corporations, and which discloses no individuals, a corporate existence is implied without being specially averred. This we regard as a settled rule of pleading in this State. *Jones v. The Cincinnati Type Foundry Co.*, 14 Ind. 89; *Stein v. Indianapolis, etc., Association*, 18 Ind. 237; *Traber v. Bright*, 32 Ind. 69; *Adams Express Co. v. Hill*, 43 Ind. 157; *The Indianapolis Sun Co. v. Horrell*, 53 Ind. 527.

It has been decided by this court, that a failure of a foreign corporation to comply with the statute providing the terms upon which it may do business in this State does not render a contract entered into by such corporation

Johnson v. The State.

within the State illegal and void, but only imposes disabilities in the enforcement of such contract, until the provisions of such act are complied with. *The Singer Manufacturing Co. v. Brown*, 64 Ind. 548; *Daly v. The National Life Insurance Co.*, 64 Ind. 1; *The Walter A. Wood, etc., Machine Co. v. Caldwell*, 54 Ind. 270; *New England, etc., Ins. Co. v. Robinson*, 25 Ind. 536.

We see no error in the refusal to quash the indictment.

On the trial a policy of insurance, issued to Finley B. Johnson by the Phoenix Insurance Company of Brooklyn, on the frame house mentioned in the indictment, and another policy issued by the same company to Isaac E. Johnson on his stock of drugs, medicines, groceries and other merchandise, were both offered and admitted in evidence on behalf of the State, over the objection of the appellant. It is insisted that the court erred in thus admitting these policies in evidence without first requiring it to be shown, either that the company which issued them was a duly organized corporation under the laws of our State, or had, as a foreign corporation, complied with our laws prescribing the conditions on which it might carry on business in this State, but we can not hold that the court so erred in the admission of such policies in evidence. The authorities above cited fully sustain the court in permitting the policies to be read to the jury without the preliminary proof insisted upon, and without other proof as to the corporate existence of such insurance company. See, also, 2 Wharton Criminal Law, secs. 1677, 1828.

James Viquesney, who testified as a witness on behalf of the State, stated, amongst other things, that, several weeks before the house and its contents were burned, (referring to the frame house and the drugs, medicines, groceries and other merchandise, which were in said house, charged in the indictment to have been burned,) Isaac E. Johnson employed him to assist William F. Johnson,

Johnson v. The State.

jointly indicted herein as above set forth, to burn said house; that the said William F. Johnson was present at the time of such employment, and participated in the conversation; that the said Isaac said at the time that William could have what goods he could carry away; that he, the witness, and the said William set the house on fire at the time it was burned, which was on or about the 27th day of February, 1878.

Mrs. Jennie Evans was permitted to testify, over the objection of the appellant, that, in the spring or the summer of 1878, she bought of Mrs. Christiana Johnson, wife of the said William F. Johnson, and at his house, two pounds of coffee for fifty cents, and one box of baking powders for ten cents.

Mrs. Mary J. Munday was also permitted to testify, over the objection of the appellant, that, between February and April, 1878, she purchased of the said Christiana Johnson, at the house of her husband, William F. Johnson, sugar, coffee, vinegar and baking powders, of the aggregate value of two or three dollars.

Mrs. Ellen McCormick was likewise permitted to testify, over the objection of the appellant, that, in May, 1878, she purchased of the said Christiana Johnson, at the house of the said William F. Johnson, her husband, fifty cents worth of sugar and coffee, for which she gave Mrs. Johnson a hen and chickens.

It was objected at the time that the testimony of the three last named witnesses was irrelevant, incompetent and immaterial, and that objection is still persisted in here. But we can not say that the court erred in admitting the testimony of those witnesses. Their testimony tended, in some slight degree at least, to corroborate the testimony of Viquesney, and brought out some circumstances to which, we are of the opinion, it was not improper to direct the attention of the jury.

Dowling v. Crapo, by her Next Friend.

What we have said practically disposes of all the questions discussed by counsel for the appellant.

No sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, at the costs of the appellant.

DOWLING v. CRAPO, BY HER NEXT FRIEND.

SEDUCTION.—Complaint.—Statute Construed.—The complaint in an action under sec. 24, 2 R. S. 1876, p. 48, for seduction, should affirmatively allege, that, at the time of the seduction charged, the plaintiff was an unmarried female."

SAME.—Subsequent Marriage.—The marriage of the plaintiff, subsequent to her seduction, to a person other than the defendant, is no bar to the action.

SAME.—Arrest of Judgment.—Where, though not affirmatively alleged in the complaint, the reasonable inference from the facts therein alleged is, that the plaintiff, at the time of the seduction charged, was "unmarried, the complaint is sufficient, after verdict for the plaintiff, on motion in arrest.

From the Clay Circuit Court.

I. N. Pierce, A. J. Kelley, G. A. Knight and C. H. Knight,
for appellant.

WORDEN, C. J.—Complaint by the appellee, against the appellant, as follows:

"The plaintiff, Martha Crapo, a minor, by her next friend, Silas Crapo, complains of the defendant, and says, that, on the — day of —, 1877, the defendant had carnal intercourse with the plaintiff, who was, previous to and until said seduction complained of, virtuous and chaste in character, and had never had sexual intercourse with any man; that, as a means of accomplishing said seduction, the defendant had regularly waited upon the plaintiff as a

Dowling v. Crapo, by her Next Friend.

suitor—had treated her in a kind and affectionate manner. Defendant also falsely, fraudulently and corruptly represented that he desired the plaintiff's hand in marriage, and frequently told the plaintiff that he intended to marry the plaintiff, thereby securing her esteem, confidence and affection, only to betray her confidence and accomplish her ruin by getting her pregnant with a bastard child, when in fact the defendant was not of full age, but was a minor, and said representations were made solely for the purpose of deceiving the plaintiff; and, as soon as defendant ascertained that plaintiff was pregnant with child by him, he cruelly deserted her, and refused to comply with his said contract of marriage, though often requested by the plaintiff so to do.

"And the plaintiff avers, that, at the time of the seduction complained of, plaintiff and her family were in high social standing and respectability; that plaintiff had also many agreeable, respectable associates; that, on account of said seduction, plaintiff's fair name was destroyed, and her family's good name greatly injured, her said associates have forsaken her, and [she] has suffered great agony of body and mind; and the plaintiff says she has been damaged," etc.

The defendant answered by general denial, and the cause was tried by a jury, who returned a verdict for the plaintiff.

The defendant interposed a motion in arrest of judgment, which was overruled, exception taken, and judgment entered for the plaintiff on the verdict.

The only error assigned is upon the overruling of the motion in arrest.

The objection urged to the complaint is, that it does not aver that the plaintiff was an unmarried female.

We are not favored with any brief for the appellee, and are not advised of the ground upon which the point was decided below.

Dowling v. Crapo, by her Next Friend.

The statute on the subject provides, that "Any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor." 2 R. S. 1876, p. 43, sec. 24.

The right to maintain an action by a female for her own seduction is, doubtless, of statutory origin, not given by the common law. Hence the complaint should show that she was unmarried, the statute not otherwise conferring the right of action upon her. *Thompson v. Young*, 51 Ind. 599; *Galvin v. Crouch*, ante, p. 56.

But the question arises, when must she have been unmarried?

According to the literal terms of the statute, she must be unmarried at the time she prosecutes the action.

But this literal construction would fail to carry out the evident intent and purpose of the Legislature. The purpose of the statute was to give the female seduced, she being then unmarried, a right of action on her own behalf for the seduction, instead of leaving the right of action solely in her parent or other person entitled thereto, to recover damages for the loss of service. And we think the qualification of her being "unmarried" relates solely to the time of the seduction, and not to the time of the prosecution of the action. We can conceive of no good reason why an action for the seduction of an unmarried female should be barred by her subsequent marriage. Such subsequent marriage does not remove the stigma, or compensate the injury caused by the seduction, nor is there any principle of public policy which requires that a subsequent marriage should bar the action. Public policy encourages, rather than discourages, marriage. Of course, we intimate no opinion as to the effect of a subsequent marriage to the seducer.

That the term "unmarried" relates to the time of the seduction, see the case of *Grover v. Dill*, 3 Iowa, 337.

Dowling v. Crapo, by her Next Friend.

We are of opinion, therefore, that, where a female has a right of action for seduction while she is unmarried, she may prosecute the action therefor after as well as before she is married.

Whether or not her husband must be joined in such action, is a question not involved in this case.

The complaint, in this case, does not allege that the plaintiff was unmarried at the time of the commencement of the action, nor was it necessary, for the reasons above stated, that it should. The question then arises, whether it is sufficiently shown that she was unmarried at the time of the seduction. We think, it is sufficiently shown after verdict.

It is not alleged, in terms, that she was then unmarried, but it is clearly implied from what is alleged. We can not suppose that the defendant would have "regularly waited upon the plaintiff as a suitor," unless she had been unmarried, nor that he "represented that he desired the plaintiff's hand in marriage," nor that "he frequently told the plaintiff that he intended to marry her," if she had not been unmarried. The defendant thus unequivocally recognized the plaintiff as an unmarried female, and he can not, after verdict affirming the allegations thus made against him, be heard to say that it does not appear that she was unmarried.

We do not determine whether the complaint would have been good on demurrer, but we have no doubt that it was good after verdict, on motion in arrest of judgment. A complaint will be construed more liberally in favor of the plaintiff after verdict, than on demurrer for want of sufficient facts.

The court below did not err in overruling the motion in arrest.

The judgment below is affirmed, with costs.

MOORE v. THE STATE.

CRIMINAL LAW.—Suffering Minor to Play Billiards.—Indictment.—An indictment charged, that, on, etc., at, etc., the defendant, "then and there having the care, management and control of a billiard table, did then and there allow, suffer and permit" G. B. "to play billiards, and a game commonly called 'pool,' upon said table, with persons whose names are unknown to the grand jury, he, the said" G. B., "then and there being a person under the age of twenty-one years; and said table not being then and there kept or used in a private family," etc.

Held, that the indictment is good.

SAME.—Evidence.—Name.—Words Describing Offence.—The words "with persons whose names are unknown," etc., used in the indictment, are descriptive of the offence, and evidence that the game alleged was played by G. B. with "a person whose name is unknown," etc., will not sustain a verdict of guilty.

SAME.—Bill of Exceptions.—Signing and Filing of.—Record.—A bill of exceptions containing the evidence, signed by the judge before the making of a motion for a new trial, and filed at the time such motion is made, is part of the record.

SAME.—Motion for New Trial.—A motion for a new trial is part of the record without a bill of exceptions.

From the Henry Circuit Court.

D. W. Chambers and ——— *Barnard*, for appellant.

T. W. Woollen, Attorney General, for the State.

BIDDLE, J.—Indictment against the appellant in the following words:

"The grand jurors for said State of Indiana, empanelled, charged and sworn in the Henry Circuit Court, to inquire within and for the body of said county of Henry, upon their oaths charge and present, that John Moore, at said county, on the 15th day of October, 1878, then and there having the care, management and control of a billiard table, did then and there allow, suffer and permit George Brown to play billiards, and a game commonly called pool, upon said table, with persons whose names are unknown to the grand jury, he, the said George Brown, then and there being a person under the age of twenty-one years;

and said table not being then and there kept or used in a private family, contrary," etc.

A motion to quash the indictment was overruled, and exceptions reserved. Plea, not guilty; trial by jury; conviction and fine; judgment and appeal. The record presents several questions for our consideration.

1. The sufficiency of the indictment. The appellant thinks the indictment is bad for uncertainty in charging the offence, but we think it is good under the statute. *Zook v. The State*, 47 Ind. 463; *Alexander v. The State*, 48 Ind. 394; *The State v. Ward*, 57 Ind. 537; *Enwright v. The State*, 58 Ind. 567.

The transcript shows us that the trial in this case was had on the 13th day of February, 1879, and the verdict returned upon the same day. The bill of exceptions, containing the evidence, was signed by the judge on the 15th day of February, 1879.

The motion for a new trial was made and causes filed, motion overruled, and judgment rendered on the verdict, and the bill of exceptions filed, on the 6th day of March, 1879, all of which was done within the term at which the cause was tried.

The State insists, that the bill of exceptions is not properly in the record, but we think it is. We can see no objections to taking the bill of exceptions as soon as the trial is over, and thus securing the evidence in the record at once, and afterwards moving for a new trial upon causes in writing shown. The motion for a new trial need not be a part of the bill of exceptions. We have often decided that it is a part of the record itself.

The court instructed the jury as follows :

" No. 1. The defendant is presumed to be innocent, and can not be convicted, until his guilt is established beyond a reasonable doubt. In order to thus establish his guilt, the State must have proved, beyond a reasonable doubt, every

material allegation of the indictment. The material allegations of this indictment are, that the defendant, John Moore, at the county of Henry and State of Indiana, at some time within two years immediately preceding the finding of said indictment (the exact time charged in the indictment not being material), did suffer George Brown to play a game of billiards or pool, with some *person* whose name to the grand jury was unknown, upon a billiard table then under his, the defendant's, care, management or control, which table was not then kept or used in a private family; and that, when such game was so played, the said George Brown was a minor under twenty-one years of age."

This instruction states that it is sufficient, as to the description of the game, if the State proves that George Brown played the game with a "*person* whose name to the grand jury was unknown." The instruction, in this respect, is not applicable to the indictment before us, nor to the evidence in the bill of exceptions. The indictment charges the game to have been played by George Brown "*with persons* whose names are unknown to the grand jury." A game with a person is not a game with persons. This is descriptive of the offence, and must be literally proved, that the record may be sufficient to bar a subsequent prosecution for the same offence.

There is no evidence in the record showing, or tending to show, that George Brown played the game with persons whose names were to the grand jury unknown.

The appellant objected to the giving of this instruction, but his objection was overruled.

For this error, the judgment is reversed; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

Martin v. Fitch et al., Executors.

MARTIN v. FITCH ET AL., EXECUTORS.

INSOLVENT MANUFACTURING COMPANY.—*Liability of Stockholder.—Company's Bill of Exchange.—Endorsement of, by Executor of Deceased Stockholder.—Withdrawal of Stock.—Statute Construed.—Corporation.*—In an action against the estate of a deceased stockholder of an insolvent manufacturing company organized under the act of May 20th, 1852, 1 R. S. 1876, p. 619, on a bill of exchange drawn, after the decedent's death, on the company, by its president and accepted by its treasurer, and endorsed by the drawee, and also, without recourse, by a stockholder who was one of the decedent's executors, the complaint set out the foregoing facts and a copy of such bill, and alleged that the decedent's executors continued to hold his stock; that such endorsement was made by such executor with the consent of his co-executor, and on behalf of such estate, pursuant to a resolution, of record, by the corporation, after the decedent's death, "that each stockholder should endorse the company's paper to the amount of his stock," etc.; and that, prior to the decedent's death, there had been a withdrawal of money by the stockholders from the capital stock of the company, at a time when it was largely indebted.

Held, on demurrer, that the complaint is insufficient.

Held, that sections 7, 8 and 9 of the act of June 15th, 1852, 1 R. S. 1876, p. 869, "respecting corporations," even were that act applicable to "manufacturing companies," do not render the decedent's estate in this case liable.

From the Dearborn Circuit Court.

J. D. Haynes and J. K. Thompson, for appellant.

J. Schwartz, A. C. Downey and H. S. Downey, for appellees.

PERKINS, J.—Appellant, James C. Martin, filed a claim in the Dearborn Circuit Court against the estate of Walter Hayes, deceased, of which DeWitt C. Fitch and James C. Hayes were executors named in the will of said Walter. The claim originated thus: Said Walter Hayes, in his lifetime, was a stockholder in the Lawrenceburgh Woollen Manufacturing Company. That company failed, largely indebted. The appellant, one of its creditors, filed the claim above mentioned against the estate of said Walter, upon his alleged personal liability while living, and that of his stock since his decease, for said indebtedness to said Martin.

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Martin v. Fitch et al., Executors.

Such liability was claimed to exist upon two grounds :

1. By contract ;
2. By virtue of sections 7, 8 and 9 of the general statute touching corporations. 1 R. S. 1876, pp. 370, 371.

Said manufacturing corporation was organized February 17th, 1866, Walter Hayes being one of the original stockholders. Said Walter departed this life in December, 1867. The appellees were his executors. The stock of said Walter was permitted to remain in said corporation. The indebtedness of the corporation to the appellant was evidenced by bills of exchange purchased by said appellant. Those bills of exchange were endorsed by James C. Hayes, one of the executors of the estate of said Walter, with the consent of the other, as follows :

"October 4, 1870, James C. Hayes, without recourse.

"Dec. 2, 1870, James C. Hayes, without recourse.

"Nov. 11, 1870, James C. Hayes, without recourse.

"Dec. 3, 1870, James C. Hayes, without recourse."

Copies of said bills of exchange were made exhibits in appellant's statement of his claim filed against the estate of said Walter Hayes, deceased.

The following is a copy of one of the bills of exchange:

"LAWRENCEBURGH, Ind., Nov. 2d, 1870. \$7000.

"The drawers and endorsers dispense with notice of non-acceptance and non-payment of this bill, and protest to be evidence of presentment. Eighty-five days after date, pay to the order of L. B. Lewis, at the First National Bank, Cincinnati, seven thousand dollars, value received, without relief from valuation or appraisement laws, and charge to account Yours, L B LEWIS, Prest.

"To Lawrenceburgh Woollen Manufacturing Co.

"Accepted, E. D. Moore, Treas."

Endorsed : "L. B. Lewis and James C. Hayes, without recourse; Saml. Fosdick."

It is claimed that said endorsement was made under

Martin v. Fitch *et al.*, Executors.

the agreement evidenced by the following journal entry, made in the corporation record, January 16th, 1869, upwards of a year ago, after the death of said Walter Hayes :

"It was agreed that each stockholder should endorse the company paper to the amount of his stock, or loan the amount of money to the company without endorsement."

The statement filed with the claim further alleged, that, on the 20th day of December, 1870, said manufacturing company became bankrupt, under the laws of the United States, and, on the 18th of July, 1871, was duly adjudged a bankrupt; and that, on the 2d day of November, 1867, the sum of twelve thousand five hundred dollars was withdrawn from the capital stock of said company and refunded to the stockholders before the payment of debts, of which said company then owed large amounts, by and under the following resolutions adopted by the directors of said company :

"Resolved, that the capital stock of the company be and the same is hereby increased to one hundred and twelve thousand five hundred dollars.

"Resolved, that each shareholder in the company shall be permitted and allowed to take, of the new or increased stock, one share for each of every two shares he now holds, and pay for the same at the rate of thirty-three dollars and thirty-three and one-third cents per share; and that the same shall be paid for in four equal monthly instalments."

Said James C. Hayes was all the time a stockholder and officer of the corporation; but it is claimed, in the matters involved, he acted for the estate of Walter, in endorsing bills of exchange and withdrawing stock, etc.

The following sections of the statute are relied upon. 1 R. S. 1876, p. 370 :

"SEC. 7. If any part of the capital stock of such company shall be withdrawn and refunded to the stockholders,

before the payment of all the debts of the company, all the stockholders of such company shall be jointly and severally liable for the payment of such debts.

"Sec. 8. No person holding stock in any such company, as executor, administrator, guardian or trustee, or as collateral security, shall be personally subject to any liability as stockholder of such company, but the estate and funds in the hands of such executor, administrator, guardian, or trustee, shall be liable therefor, and the person pledging his stock as aforesaid, shall be considered as holding the same.

"Sec. 9. Every such executor, administrator, guardian, or trustee, shall represent the share of stock in his hands and vote as a stockholder, and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at such meetings, and vote accordingly."

A demurrer to the complaint in the cause setting out the above facts was sustained for the want of sufficient facts; exception was entered; the plaintiff declined to amend; and final judgment was rendered against him. He appealed to this court, and assigns for error the sustaining of the demurrer to his complaint.

The Lawrenceburgh Woollen Manufacturing Company was organized under the law for the incorporation of manufacturing, etc., companies, and the amendments thereto. 1 R. S. 1876, p. 619, *et seq.* Section 6 of said act authorized any corporation organized under it to increase its capital stock, and prescribed the manner of doing it, etc.; and section 12 authorized any such corporation to reduce its capital stock and prescribed the manner of doing it, etc.

It may be questionable, therefore, whether the provisions of the general act touching corporations, above cited, are applicable to corporations organized under the act for the creation of manufacturing, etc., corporations. But we do not care to decide the cause upon this ground. It is not necessary that we should do so. We may here properly re-

Martin v. Fitch *et al.*, Executors.

mark that many of the questions discussed by counsel, in the case at bar, are decided in the case of *Wood v. Harrison*, 50 Ind. 480; *Burkam v. Fitch*, 51 Ind. 375; *Gilbert v. The Southern Indiana Coal, etc., Co.*, 62 Ind. 522. And it is clear to our minds that the particular grounds, aside from those considered and passed upon in the cases cited, on which liability is claimed to exist in this case, do not exist.

1. No liability exists upon the bills of exchange set out in the complaint. This is too plain for argument.

2. The *inter se* agreement, mentioned in the journal entry in the corporation record and copied above, was not an agreement with or on behalf of particular third persons. There is nothing showing who of the members of the corporation adopted it, nor how it was adopted. It is signed by no one. We have a case much in point: On the 27th of February, 1822, at a meeting of the Andover Mechanic Association, a corporate body, a by-law was adopted as follows:

“The members of this association pledge themselves, in their individual as well as their collective capacity, to be responsible for all moneys loaned to this association, and for payment of which the treasurer may have given his obligation, agreeably to the direction of the directors.”

After the adoption of the above by-law, money was loaned to the corporation, and the note of the treasurer taken therefor. The plaintiff recovered judgment against the association on this note. On appeal to the Supreme Court of Massachusetts, Judge DEWEY, in delivering the opinion of the court, said:

“The plaintiffs, aware of this difficulty in any attempt to charge the defendant, by force of the provisions of the act of incorporation, or by reason of any general law imposing such liability on the defendant for the debts of the corporation, seek to establish their right to recover, in the present action, upon other grounds. For this purpose

they rely upon the eleventh article of the by-laws of the corporation, adopted by its members soon after the act of incorporation. That by-law is in these words :” (It is copied above in this opinion.)

“The only effect that can be given to this by-law is that of an act or vote of the members of the corporation acting in their corporate capacity. It is not the act of any individual member, nor does the fact of its being found upon the records of the corporation, as a vote duly adopted, authorize the inference that all or that any number greater than a bare majority voted for its adoption.”

The court held that individual liability could not be thus imposed upon the stockholders, and reversed the judgment of the court below. On this point the court used this language :

“It is a fatal objection to the maintenance of the present action, that the defendant has never, by any valid legal contract, bound himself individually for the payment of the loan made by the plaintiffs to the mechanic association. His name was never subscribed to the pledge of the corporation, that the individual members would guaranty the debts of the corporation. His oral promises, if made, would be inoperative and void, by reason of the statute of frauds. To give any legal effect to these pledges of individual liability, they must have been the individual acts of the members, adopted and sanctioned by them by their signatures, under their own hands.” *Trustees, etc., v. Flint*, 13 Met. 539.

There is nothing in the record showing that James C. Hayes was acting, in the premises, other than in his character of a stockholder, which he was, in said company. It nowhere appears that he was assuming to act in his character of executor, with a view to bind the estate of Walter Hayes. No liability, by contract, is shown.

3. Nor is any liability shown under the statute quoted, even if that statute applies to the case now under considera-

Rankin *et al.* v. Walker.

tion. It does not appear that any part of the capital stock of the corporation was withdrawn.

The judgment is affirmed, with costs.

RANKIN ET AL. v. WALKER.

PLEADING.—*Complaint on Account and to Enforce Mechanic's Lien.*—*Copy of Notice Struck Out.*—Where, in an action to recover, and to enforce a mechanic's lien, for the value of building materials alleged to have been furnished by the plaintiff for the defendant, the copy of the notice of the alleged lien is struck out of the complaint on motion, it can not be considered by the court in determining the sufficiency of the complaint thus eliminated.

SAME.—If, in such case, the facts alleged in the complaint, after striking out the copy of notice, show an indebtedness due from the defendant to the plaintiff, it is sufficient on demurrer.

From the Dearborn Circuit Court.

R. Gregg and J. A. Parks, for appellants.

J. D. Haynes and J. K. Thompson, for appellee.

NIBLACK, J.—This was an action to recover the value of materials alleged to have been furnished for and used in a building owned by the appellee, the defendant below.

The complaint was in two paragraphs.

The first paragraph was as follows:

“Chas. S. Rankin, Augustus Rankin and Oliver L. Rankin, doing business under the firm name and style of C. S. Rankin & Company, complain of John Walker, and for a cause of action say, that the defendant is owing and indebted to them in the sum of \$89.80, for building materials furnished by plaintiffs to him, and further say that these plaintiffs, in the above entitled cause, furnished building materials on the 11th day of June, 1873, for the purpose

Rankin et al. v. Walker.

of constructing and erecting a new frame dwelling-house upon the lands of the said defendant, and that the said John Walker acquiesced in the furnishing of said materials and accepted the same, and thereby became and is indebted to these plaintiffs in the sum of eighty-seven dollars and eighty cents, is now in possession and living in the said house, and that the materials furnished by the plaintiffs to the defendant were reasonably worth one hundred dollars, all of which remains unpaid and due.

"A bill of the said materials is filed herewith, and also the lien which was filed in the recorder's office, and recorded within sixty days after the said building was completed, giving a complete description of the real estate upon which this building was erected, and locating the same in Dearborn county and State of Indiana, and forming a part of the plaintiffs' complaint. The plaintiffs pray judgment for \$87.80, that it be adjudged a lien on said property, and for a sale thereof, and all other proper relief."

The second paragraph alleged, that the defendant contracted with one Joseph Suserman to erect for him, on certain real estate owned by him, a frame dwelling-house, and that the plaintiffs furnished to the said Suserman certain materials, as set forth in the first paragraph, which were used by him, said Suserman, in the construction of said building; that notice of the plaintiffs' intention to hold a lien on said building and real estate, for said materials, had been filed and duly recorded in the recorder's office, within sixty days after the completion of said building. Wherefore judgment was demanded for the enforcement of said lien.

A notice of an intention to hold a lien on said building and real estate, marked as "Exhibit A," was filed with both paragraphs of the complaint.

On the defendant's motion, the court struck out of the complaint the notice of lien, known as "Exhibit A," as

Rankin *et al.* v. Walker.

above stated, and then sustained a demurrer to the first paragraph of the complaint thus eliminated.

The plaintiffs refusing to plead further, a final judgment upon demurrer was rendered against them.

Errors are assigned upon the sustaining of the demurrer to the first paragraph of the complaint and upon the striking out of the notice of lien, as above set forth.

The notice of lien, having been struck out of the complaint and not having been brought back into the record by a bill of exceptions, is not properly before us, and hence we can not review the action of the court in striking it out. *Kesler v. Myers*, 41 Ind. 543; *Miles v. Buchanan*, 36 Ind. 490; *Potter v. Stiles*, 32 Ind. 318; *Fisher v. Ewing*, 30 Ind. 130.

There is a bill of exceptions in the record, but it does not set out, or otherwise identify, the notice which it is complained was improperly struck out.

The facts set up in the first paragraph of the complaint might have been much more compactly and precisely pleaded, but we think these facts, as stated, were sufficient to authorize the inference of a purchase of the materials sued for by the defendant, and of a consequent indebtedness by him to the plaintiffs for such materials.

Independently of all reference to the notice of an intention to hold a lien, enough was averred to justify a personal judgment against the defendant.

The court therefore erred in sustaining the demurrer to this first paragraph of the complaint. *Bourgette v. Hubinger*, 30 Ind. 296; *O'Halloran v. Leachey*, 39 Ind. 150; *Harrington v. Dollman*, 64 Ind. 255.

The judgment is reversed, with costs, and the cause remanded with instructions to overrule the demurrer to the first paragraph of the complaint, and for further proceedings.

Young v. Schlosser.

YOUNG v. SCHLOSSER.

CONTRACT FOR BENEFIT OF ANOTHER.—*Sale and Conveyance Subject to Specified Encumbrances — Action by Another Encumbrancer. — Judgment. — Bankruptcy. — Indemnity.*—The assignee of a bankrupt estate having represented to the bankrupt court, in writing, that he had negotiated the sale of the bankrupt's real estate to another, subject to the lien of a certain mortgage and certain taxes thereon, that court made an entry reciting the substance of such writing, and ordering the assignee to "make said sale * upon the terms aforesaid," the purchaser, "by a proper instrument. * covenanting to pay the incumbrances thereon," whereupon the assignee conveyed as ordered, and the purchaser executed a bond assuming, "as a part of the purchase consideration * the payment of all taxes, liens and encumbrances, of any and all descriptions, on and against said lands," etc.

Held, in an action on such bond, against the purchaser, by one holding a personal judgment against the bankrupt, which was a lien upon such land before he became bankrupt, that the plaintiff can not recover.

From the Warren Circuit Court.

L. T. Miller and *J. M. Rabb*, for appellant.

J. W. Sutton, for appellee.

WORDEN, C. J.—Action by the appellant, against the appellee.

Issue; trial by the court; finding and judgment for the defendant, a motion for a new trial having been overruled.

The following are the material facts in the case, as shown by the pleadings and evidence :

On November 21st, 1873, the plaintiff recovered a judgment in the circuit court of Warren county, Indiana, against Daniel and Edward Bowlus, for the sum of one thousand two hundred and twenty-one dollars, and costs, which became a lien on certain land described, situate in that county, and belonging to said judgment debtors, or one of them.

Afterward, proceedings in bankruptcy were commenced in the District Court of the United States for the District

Young v. Schlosser.

of Indiana, against the two Bowluses, and they were duly adjudged bankrupt, and an assignee, one Joseph Poole, was appointed, in whom the estate of the bankrupts became vested.

Afterward, the assignee filed his petition in the District Court, for leave to sell the land mentioned, which petition, after entitling the cause and the court, was as follows :

“Joseph Poole, assignee of Daniel and Edward Bowlus bankrupts, respectfully represents that said Daniel and Edward Bowlus, at the time of their adjudication as bankrupts, were possessed of and owned in fee the following described real estate, situate and lying in Warren county, Indiana, to wit :” (Here the land is described) “containing in all two hundred and eight (208) acres, more or less ; that there are valid subsisting mortgage liens on said lands to the amount of six thousand dollars and accrued interest ; that there are State and county taxes to the amount of seven hundred dollars due and a lien upon said lands ; that, said lands are of the probable value of forty dollars per acre ; that the legal title to said lands was in Edward Bowlus prior to the adjudication in bankruptcy herein, who then was and now is a married man ; that said assignee has negotiated a sale of said lands to Elias Schlosser, Esq., of Warren county, Indiana, on the following terms : seven hundred dollars cash, and seven hundred dollars to be paid September 1st, A. D. 1874 ; the said Schlosser to assume all the said incumbrances on said lands, that such sale will be for the manifest material benefit of the estate of said bankrupts, this assignee candidly represents to this honorable court. Wherefore, in consideration of all the above facts, the assignee respectfully prays the court to authorize and confirm the said sale of the lands herein described to the said Elias Schlosser, in all respects con-

Young v. Schlosser.

formably to this petition, and for such other directions as may seem proper."

This petition was duly verified by the assignee.

Afterward, on April 4th, 1874, the court made an entry of record, which, after reciting the filing of the petition and the substance thereof, is as follows :

"It is therefore ordered, that said assignee do make said sale of the interest of the bankrupt estate in said lands, upon the terms aforesaid, the said Schlosser, by proper instrument, in writing, covenanting to pay the incumbrances thereon."

Afterward, on October 17th, 1874, the assignee, in pursuance of the order of the court, executed a conveyance of the land to the defendant, Schlosser, the fourteen hundred dollars purchase-money having been paid, and took from Schlosser a bond of the same date, as follows :

"Whereas the undersigned, Elias Schlosser, has purchased of Jos. Poole, assignee of Daniel and Edward Bow-lus, bankrupts, the following described lands, viz.:" (Here the lands are described.)

"Now as a part of the purchase consideration of said land, the said Elias Schlosser assumes the payment of all taxes, liens and incumbrances, of any and all descriptions soever, on and against said lands, and hereby covenants and agrees and expressly binds himself to indemnify and forever absolve and save harmless the estate of said bankrupts from any and all liability on account of any and all liens and incumbrances or debts on or against said lands, in law or equity. Witness," etc.

The plaintiff's judgment remains unpaid, and it is to be inferred that he did not file his claim thereon against the estate in the court of bankruptcy. The proceedings in bankruptcy were ended before the commencement of this action, and the bankrupts discharged. Also, before the commencement of this action, the plaintiff notified the

Young v. Schlosser.

defendant that he, the plaintiff, accepted and claimed the benefit of the defendant's obligation to pay all the incumbrances on the land.

The object of the action was to obtain a personal judgment against Schlosser for the payment of the plaintiff's judgment against the Bowluses, on the theory that the bond entered into by the defendant to the assignee bound him to make such payment.

We suppose there can be no doubt that Schlosser, the purchaser of the land, took it subject to whatever liens there may have been upon it, and that those liens could be enforced in the manner prescribed by law, and according to their respective priorities. But, whether he became bound by the bond mentioned, to the respective lien holders, for the payment personally of all those liens, is a different question.

It may be conceded, that, under the established practice in this State, where a contract is executed to one person for the benefit of another, the latter may sue upon it for its breach. Hence the plaintiff may sue upon the bond executed by the defendant to the assignee, if that bond contains any valid stipulations beneficial to the plaintiff, which have been broken.

But we are of opinion, that the bond in question contains no valid stipulations beneficial to the plaintiff.

It appears by the petition of the assignee to the court of bankruptcy, that the land was subject to a mortgage lien of \$6,000 and interest, and tax liens to the amount of \$700, and that he had negotiated a sale of the land to the defendant, for the sum of \$1,400, subject to those liens. Nothing is said about judgment liens whatever. And he prayed the court to authorize and confirm the sale thus made.

The court ordered that the assignee "do make said sale of the interest of the bankrupt estate in said lands, upon the terms aforesaid, the said Schlosser, by proper instrument, in

Lapping *et al.* v. Duffy *et al.*

writing, covenanting to pay the incumbrances thereon." Thus it is seen, that the court ordered the sale of the land "upon the terms aforesaid," that is, for the \$1,400, the purchaser assuming the payment of the mortgage lien and the lien for taxes. The closing part of the order, in reference to the covenant to be required for the payment of the incumbrances, must be held to have had reference only to the incumbrances previously mentioned, which the purchaser assumed to pay.

The bond given seems to be broader than the terms of the sale, as shown by the petition and order of sale. It may have been good as an indemnity to the estate against all liens upon the land; and this, we are inclined to think, was the only purpose it was intended to subserve. The estate, however, is not complaining of its breach, nor does it appear to have been damnified by the plaintiff's claim.

So far as the bond purports to bind the defendant personally for the payment of liens, other than those specified in the terms of the sale, as shown by the petition and order of the court, it goes beyond the terms of the sale and the order of the court, and is, to that extent, without consideration.

The judgment below is affirmed, with costs.

LAPPING ET AL. v. DUFFY ET AL.

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JUDGMENT.—*Receipt, of Record, Acknowledging Payment.*—*Estoppel.*—*Subsequent Purchaser of Land Subject to Lien.*—*Notice.*—A receipt entered by the judgment plaintiff or his assignee, upon the record of a judgment which is a lien upon real estate, acknowledging payment or satisfaction of the same or any part thereof, does not estop such person from explaining, contradicting or setting aside such receipt, even as against a subsequent purchaser of such real estate without notice.

SAME.—*Judgment Assigned as Collateral.*—*Effect of Payment of Debt.*—Upon payment, by the debtor, of a debt owing from him to the assignee of a judgment assigned to the latter simply as collateral security, the equitable title to the judgment vests in the assignor of the judgment.

Lapping *et al.* v. Duffy *et al.*

SAME.—*Entry of Satisfaction.*—*Statutes Construed.*—Neither section 377, p. 188, nor section 5, p. 384, 2 R. S. 1876, authorize satisfaction of a judgment by a simple receipt entered on the record thereof.

From the Floyd Circuit Court.

J. H. Stotsenburg and *W. W. Tuley*, for appellants.

A. Dowling, for appellees.

WORDEN, J.—This case has once been in this court, and the decision upon it is reported in 47 Ind. 51, to which we refer for a statement of the principal facts in the cause.

After the case went back from this court, the death of Michael C. Kerr was shown to the court, and his executrix was made a co-plaintiff in the cause with George W. Lapping. The cause was submitted to the court for trial, and the court found there was due to Lapping, on the judgment assigned to him, the sum of \$1,037.50, and that nothing was due to the executrix of Kerr, deceased. The plaintiffs made the proper motion for a new trial, but the motion was overruled, and exception taken.

The question arises whether the amount found in favor of Lapping was not too small, and whether there was not something due to the executrix of Kerr.

We may mention here, that Breyfogle, one of the defendants, held the property by virtue of a sale under the incumbrances mentioned in the former opinion in this cause, which were junior to the mortgage from Duffy and wife to McClung, but neither Kerr nor Lapping was a party to the proceedings under which he held.

On the trial of the cause, it appeared that the mortgage executed by Duffy and wife to McClung, and by him assigned to the Ohio Insurance Company, was foreclosed by the insurance company, on June 26th, 1861, for the sum of one thousand seven hundred and ninety dollars, including the amount then due, and to become due thereafter.

This judgment was assigned by the insurance company to Kerr, on September 13th, 1861.

Lapping et al. v. Duffy et al.

On the same day, September 13th, 1861, Kerr assigned four hundred and thirty-nine dollars and forty-six cents of the last instalment of the judgment, to Eliphalet Hickman, with interest from that date. -

Below the assignment is the following receipt or statement:

"The above amount due to Hickman has been fully paid. (Signed,) M. C. KERR, Atty. for H."

Duffy made four payments to Kerr, on the judgment, prior to December 6th, 1862, amounting in all to one hundred and eighty dollars.

On December 6th, 1862, Kerr assigned seven hundred dollars of the judgment to David Robertson, with interest from that date. This amount seems to have been paid by Duffy to Robertson.

On October 4th, 1867, Kerr assigned one thousand five hundred dollars of the judgment to the plaintiff Lapping, with interest from that date.

On the same day, October 4th, 1867, Kerr and Duffy entered into the following written stipulation, viz.:

"October 4th, 1867.

"On full adjustment of the state of the accounts between us this day, in connection with the judgment of the Ohio Ins. Co. against P. Duffy, which was assigned to M. C. Kerr, it is agreed that there remains due and unpaid on said judgment (which has this day been assigned, on the face thereof, to Geo. W. Lapping,) the sum of \$1,500; and that there now remains due on the same judgment, to M. C. Kerr, the further sum of \$565.33, and that all the residue in full paid by said Duffy; and, on said balance due to said Kerr, said Duffy agrees to pay interest at the rate of eight per cent, and said Kerr agrees to give said Duffy one or more years in which to pay the same.

(Signed,) "M. C. KERR,
"P. DUFFY."

Nothing appears to have been paid upon the judgment

Lapping et al. v. Duffy et al.

since the above agreement was entered into, except sixty dollars a year for four years, which Duffy paid to Lapping, in pursuance of an agreement to pay four per cent. interest in addition to the legal interest on the judgment.

It will be seen that the agreement between Duffy and Kerr must have been entirely disregarded, otherwise the court must have found a much larger sum as due to Lapping, and a considerable sum due to the executrix of Kerr.

Upon a clear showing of a mistake in estimating the amount due upon the judgment, the mistake might, doubtless, be corrected.

But conceding, for the purposes of this decision, that there was a mistake in estimating the amount due on the judgment at the time of the assignment to Lapping and the execution of the agreement between Kerr and Duffy, and that the court was right in going behind the agreement, there was still an item which the court, from the amount found, must have excluded, that should, in our opinion, have been allowed as part of the amount due on the judgment.

We proceed to consider the item: The facts in relation to the assignment of the four hundred and thirty-nine dollars and forty-six cents of the last instalment of the judgment, to Hickman, are, as shown by the evidence, as follows: This amount was assigned by Kerr to Hickman, as collateral security for the payment of a debt which the Ohio Insurance Company owed Hickman. Afterward, Kerr paid the debt to Hickman, to secure which this part of the judgment had been assigned. Perhaps this was paid with the money of the insurance company, but it is not material. The debt was paid to Hickman, not by Duffy, but by Kerr, and thereupon the amount thus assigned to Hickman properly belonged, in equity, to Kerr. It should have been reassigned to him; but, instead of making a reassignment, it was receipted in the manner above shown. There can

be no doubt, that, as between Hickman, Kerr and Duffy, when Kerr paid the debt, to secure which the assignment was made, this portion of the judgment in equity reverted to Kerr.

But it is claimed, that, as against Breyfogle, an innocent purchaser of the property, the facts explaining this transaction could not be shown. It is claimed, that, as Breyfogle found this part of the judgment assigned to Hickman, and receipted by Hickman, he had the right to presume that it was paid by Duffy, and that the judgment was so far extinguished.

The question seems to be presented, whether a receipt entered by a judgment plaintiff or his assignee, upon the record of the judgment, of a part or all of the judgment, which is a lien upon real estate, is conclusive as against a subsequent purchaser of the property without notice; or whether, as against him, it can be explained, contradicted, and set aside.

An ordinary receipt may be explained, controlled, qualified or contradicted by parol evidence. *Pauley v. Weisart*, 59 Ind. 241. If the receipt in the case before us had been upon a detached piece of paper, and had been seen by Breyfogle before making his purchase, it will scarcely be contended that he would have had the right to rely upon it as showing a payment so far of the judgment, to the exclusion of evidence explaining or contradicting it.

We do not see how the receipt in this case can have any greater force and effect than if it had been written upon a separate piece of paper, and not upon the record of the judgment. We have no statute providing for entering such receipts upon the record of judgments, or determining the force and effect of such receipts. It is, to be sure, provided, that "Satisfaction of a judgment, or credits thereon, may be ordered for sufficient cause, upon notice and motion." 2 R. S. 1876, p. 188, sec. 377.

Foster, Assignee, v. Brown *et al.*

This statute, however, contemplates judicial action, a judicial determination, and has no application to the case before us.

There is a provision in the statute for the entry of satisfaction of mortgages on the record thereof, and the effect of such entry. 2 R. S. 1876, p. 334, sec. 5. Whatever may be the effect of an entry by the mortgagee of satisfaction of a mortgage upon the record thereof, we are clear, that, as the law does not provide for the receipting of judgments upon the record, or the effect of such receipts, they stand upon no other ground than ordinary receipts, and are subject to be explained or contradicted, as against purchasers without notice.

The receipt upon the record, not being provided for by law, was not constructive notice to any one, nor could it work an estoppel in favor of any one. See *Etzler v. Evans*, 61 Ind. 56.

The amount of the judgment assigned to Hickman ought to have been regarded as an unpaid portion of the judgment, and treated as if the assignment had never been made.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

NOTE.—Howk, J., having been of counsel in the cause, was absent when it was considered.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

FOSTER, ASSIGNEE, v. BROWN ET AL.

ASSIGNEE FOR BENEFIT OF CREDITORS.—*Complaint by.*—*Copy and Recording of Assignment.*—A complaint by one alleging himself to be an assignee for the benefit of creditors, which does not allege that the deed of assignment has been duly recorded, and does not contain a copy thereof, is insufficient on demurrer.

Foster, Assignee. v. Brown *et al.*

SAME.—Life Insurance Policy on Insolvent, for his Widow.—Parties.—Fraud.

—Presumption.—In an action by an assignee for the benefit of the creditors of a deceased debtor, against the widow, to recover the amount of a policy of insurance issued upon his life and made payable to her, the complaint alleged that a policy had been procured, and certain premiums paid, by the debtor, prior to his making assignment, but at a time when he was in fact insolvent; and that, after the assignment, he had surrendered such policy in consideration of a paid-up policy for her benefit and the payment to him of a certain sum of money. Prayer for the recovery of the proceeds of such policy, which were on deposit awaiting the determination of the action.

Held, on demurrer, that the assignee was the proper party to maintain the action.

Held, also, that fraud in obtaining the policies is not presumed, and that the complaint is insufficient.

From the Warren Circuit Court.

J. McCabe, for appellant.

W. P. Rhodes, for appellees.

PERKINS, J.—A complaint as follows was filed as the cause of action in this case:

“Richard Foster, assignee of Levi D. Brown, complains of Elizabeth A. Brown, and says, that heretofore, to wit, on the 12th day of August, 1876, one Levi D. Brown, of said county, executed a written assignment of all his property, both real and personal, including choses in action, in due form of law, for the benefit of all his creditors, to the plaintiff; that plaintiff then and there qualified, took upon himself and entered upon the discharge of the duties of said trust, pursuant to the statute in such case etc.; that said Brown had been totally insolvent for several years prior thereto; that, on the 12th day of August, 1873, said Brown obtained from the Life Association of America a policy of insurance on his life, payable to said Elizabeth, his wife, in trust for her and her children, sixty days after proof of his death, conditioned that said Brown should pay to said Life Association \$159 annual premium; that said Brown paid, out of his own funds, said annual

Foster, Assignee, v. Brown et al.

- premium for the years 1873, 1874, 1875 and 1876, though he was at the time utterly insolvent, having creditors to a large amount; that, after said assignment, viz., on the 1st day of September, 1876, on the application of said Levi D. Brown, said above mentioned policy was surrendered to said company, in consideration of which said company paid said Levi D. Brown forty dollars, and issued a new policy, numbered 40,777, on the life of said Levi D., with annual premiums thereon paid up for two years, by which said company promised, sixty days after proof of the death of said Levi D. Brown, to pay \$5,000 to his said wife, Elizabeth A. Brown, in trust for herself and the children of the assured, or the legal holders of the policy; but, if the assured be living on the 1st day of September, 1886, the policy shall then expire, and the association be then without liability." Copies of both of said policies are here copied in the complaint.

The complaint then proceeds: "That afterward, on the 28th day of March, 1877, said Levi D. Brown, still continuing totally insolvent and unable to pay his debts, as afore-said, departed this life intestate, leaving said defendant Elizabeth, as his surviving widow, and leaving no other property than that already mentioned; that there has been no administrator appointed for his estate, both the heirs and creditors, by common consent, agreeing that this plaintiff shall proceed to administer the assets precisely as if said Levi D. still lived; that the said insurance company has deposited said five thousand dollars in bank, to abide the event of this suit; that said Elizabeth claims it, but this plaintiff claims that the title to the same passed to him by said assignment, being equitably the property of said Levi D. Brown, and he demands the recovery of said money for the benefit of the creditors of said Levi D. Brown. Wherefore," etc.

We re-state the dates of the leading transactions averred in the complaint:—

The assignment made by Brown to the plaintiff was executed on the 12th day of August, 1876.

The policy of insurance, on which the money sued for in this case is due, was obtained on the 1st of September, 1876. On the 28th of March, 1877, said Brown departed this life. On the 29th of October, 1877, this suit was instituted.

A demurrer was sustained to the complaint. The plaintiff declined to amend, and final judgment was given against him.

It will be observed, that, while the complaint alleges that the assignment was in writing, it contains no copy of it. See *Lytle v. Lytle*, 37 Ind. 281; *Ross v. Boswell*, 60 Ind. 235. Nor does the complaint show that the assignment was ever recorded; hence, it fails to show title in the assignee, plaintiff in this suit, to the property embraced in the assignment. *New v. Reissner*, 56 Ind. 118; *Forkner v. Shafer*, 56 Ind. 120.

It is argued by counsel for appellee, that no right to the claim sued upon is shown to have passed by the assignment to the plaintiff, and that it is the right of creditors alone to proceed to set aside fraudulent conveyances and transfers of property.

We are of the opinion, if the policy of insurance was fraudulent as to creditors, and the claim on account thereof passed to the assignee under the assignment, that, according to the authorities cited in *Garner v. Graves*, 54 Ind. 188, said assignee might maintain this suit, but not otherwise, for the amount actually paid for the policy.

Is the policy of insurance shown to have been fraudulent, as to creditors? The policy on which the five thousand dollars is due was not, of itself, fraudulent. It was procured after the assignment was made, and nothing was paid to obtain it, but forty dollars were refunded to said Levi D. Brown, on its reception. Was the previous policy,

Foster, Assignee, v. Brown et al.

exchanged for said five-thousand-dollar policy, fraudulent? The complaint does not allege that it was procured with any fraudulent intent. It simply alleges that the party was insolvent when he obtained and paid for it. It does not allege that said party knew, or believed at the time, that he was insolvent.

The facts alleged in the complaint are, that, in 1873, three years prior to his making the assignment, the said Levi D. Brown procured a policy, on which, in that and three succeeding years, he paid, in annual instalments, the sum of five hundred and ninety-six dollars, after deducting the forty refunded, and no more. This is all of the amount that his estate was diminished, on account of which his creditors now claim the five thousand dollars.

At the same time during the said three years, Brown, so far as the complaint shows, was pursuing his regular business, his creditors were not interfering; it is not shown that he was not industrious and economical, or that he was not honest in business, etc. In our opinion, we can not say, upon the facts of the case as alleged in the complaint, that the procuring of said policy was fraudulent as to creditors.

Under such circumstances, a man might well be justified in contributing, each year, a small sum out of his acquisitions, with a view to securing a support to his wife and children after he should have departed this life.

High authority has said, that he who neglects to provide for his household (by fair means, of course,) is worse than an infidel. 1 Timothy, chap. v, ver. 8. We quote the verse:

“But if any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel.” See *Pence v. Makepeace*, *post*, p. 345.

The judgment is affirmed, with costs.

MENZIE v. ANDERSON ET AL.

DIVORCE.—Alimony.—Contract.—Judgment.—Exemption from Execution.—

A judgment for alimony is not a debt growing out of, or founded upon, a contract, express or implied, and the debtor can not claim exemption of any property from execution on such judgment.

From the Kosciusko Circuit Court.

C. Clemans, for appellant.

W. S. Marshall, for appellees.

BIDDLE, J.—Susan Anderson, on her complaint, obtained a decree of divorce and a judgment of alimony for five hundred dollars, against John Anderson, then her husband. John at the time had no property, either real or personal. Subsequently he married another woman, became a householder and the head of a family in the county, and inherited an interest in certain real estate from his father. A writ of execution was issued upon the judgment of alimony, and placed in the hands of the sheriff, who levied upon the interest of John Anderson in the real estate he so inherited. As a householder of the county, he made his claim to the sheriff for the real estate, which was appraised at less than three hundred dollars, as exempt from execution. The sheriff denied his right to the exemption, and was about to sell the real estate upon the writ in his hands. This complaint is brought upon these facts, praying an injunction against the sale.

A demurrer alleging the insufficiency of the facts to maintain the case was sustained. The appellant, who had purchased the real estate from Anderson, and brought this suit, excepted to the ruling upon the demurrer, and appealed to this court.

Neither party claims that there is any irregularity in the proceedings; but the appellant insists that John Anderson has a right to the exemption claimed, which, if allowed, will support his title to the real estate; while the appellees insist that Anderson is not entitled to

Atherton v. Allen et ux.

the exemption against a judgment for alimony, which, they insist, is not a "debt growing out of, or founded upon a contract, express or implied," as provided by the statute. 2 R. S. 1876, p. 352; and this controversy presents the only question in the case.

Causes of divorce in this State are as follows:

1. Adultery;
2. Impotency before marriage;
3. Abandonment for two years;
4. Cruel and inhuman treatment;
5. Habitual drunkenness of either party, or the failure of the husband to make suitable provision for his family;
6. Failure of the husband to make reasonable provision for his family for a period of two years;
7. Conviction, subsequent to marriage, of an infamous crime. Sec. 8, 2 R. S. 1876, p. 327.

It will be observed that, although marriage is a civil contract, yet the causes of divorce, except the second, all arise out of tort; and a marriage, while the second cause existed, would be a gross wrong, in violation of the main purpose of the union. We conclude, therefore, that alimony is not a "debt growing out of, or founded upon a contract, express or implied," within the meaning of the statute.

The judgment is affirmed, at the costs of the appellant.

ATHERTON *v.* ALLEN ET UX.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not disturb a finding on the mere weight of the evidence.

From the Madison Circuit Court.

C. D. Thompson, for appellant.

J. W. Sansberry and *E. B. Goodykoonts*, for appellees.

Howe, J.—This was a suit by the appellant, as plaintiff, against the appellees, as defendants, to enforce an alleged mechanic's lien.

The appellant's complaint contained but one paragraph, in which he alleged, in substance, that the appellee Ann C. Allen, the wife of her co-appellee, William B. Allen, was the owner in her own right of certain real estate, particularly described, in Madison county, Indiana, on which real estate she, the said Ann C. Allen, had constructed a grist-mill and saw-mill; that said real estate was a mill-seat, and was not fit for any other purpose; that, to enable her to enjoy said real estate, it became and was necessary to build said grist-mill and saw-mill, which greatly improved and bettered the same, and rendered the same enjoyable; that, in the construction of said building, the appellant furnished to said Ann C. Allen, at her special instance and request, a large amount of lumber which was used in the construction of said building; that there was yet due and unpaid to appellant for said lumber from her, the said Ann C. Allen, the sum of \$118.42, balance on said lumber; that, on the 20th day of February, 1874, the appellant filed in the recorder's office of said county a notice of intention to hold a lien on said building, within sixty days from the completion of said building, which notice was on the same day recorded in the proper record of said county, and a copy of said notice was filed with said complaint. Wherefore, etc.

To this complaint the appellees answered in two paragraphs, in substance, as follows:

1. A general denial; and,
2. That, before the commencement of this suit, the appellant sold and transferred to one John M. Ware all of his interest in said lien, and his claim against the appellees, and that they fully paid the same to said Ware, before this suit was commenced.

Atherton v. Allen et ux.

The cause was tried by the court, and a finding was made for the appellees. The appellant's motion for a new trial was overruled by the court, and to this ruling he excepted, and judgment was rendered against him for the costs of suit.

In this court the only error assigned by the appellant is the decision of the circuit court in overruling his motion for a new trial.

It was not disputed that the appellant had furnished the appellee Ann C. Allen the amount of lumber mentioned in his complaint, nor that the lumber had been furnished for, and used by her in, the building of her mills, nor that the appellant had filed notice of his intention to hold a lien, and that such notice was recorded in the proper recorder's office within sixty days after the completion of the mills. The controversy between the parties related to the assignment by the appellant of his lien and claim to John M. Ware, as alleged in the second paragraph of the appellees' answer. The appellees proved by Patrick Mahoney, a witness in their behalf, that the appellant had told the witness that he had sold his account on the appellees to Dr. Ware. The appellee Ann C. Allen testified in her own behalf, that Dr. Ware had told her he had bought the claim in suit from the appellant, and that she had paid Ware the amount of the claim, in a settlement with him. On the other hand the appellant denied, in his testimony, that he had sold his claim against the appellees to Dr. Ware, or that he had ever told the witness, Mahoney, that he had sold the claim to Dr. Ware.

This was all the evidence, in substance, on the point now under consideration, and it must be confessed, we think, that it is not of the most convincing character. But we can not say that the evidence did not tend to sustain all the averments of the second paragraph of the appellees' answer, and the finding of the court thereon. Under the

Marshall v. Stewart.

settled practice of this court, therefore, we can not disturb the finding of the court below, on the evidence.

The judgment is affirmed, at the appellant's costs.

MARSHALL v. STEWART.

EVIDENCE.—*Action in Separate Counts, upon Promissory Note and a Judgment thereon.—Merger.—Former Recovery.*—Where one paragraph of a complaint counts upon a judgment rendered on a promissory note, and a second paragraph counts upon the note itself, to which latter count former recovery is pleaded, no objection to the admission of the note in evidence under the second paragraph can be founded on the fact that it is merged in the judgment.

SAME.—*Judgment.—Foreclosure.—Execution.—Merger of Promissory Note.*—

In an action upon a promissory note, and to foreclose a mortgage securing its payment, against the maker and his wife, there was a finding for the amount due on the note, and judgment was rendered on the finding, against the maker personally, "to be levied and collected without any relief," etc. There was also a decree for the foreclosure of the mortgage, and sale of the mortgaged premises, and for execution over for any residue, but this latter clause was subsequently struck out.

Held, that the note was merged in the judgment.

Held, also, that the judgment was personal, that execution could properly have been issued thereon for any residue unsatisfied after sale of the mortgaged premises, and that a transcript of such proceedings and judgment is competent evidence in an action against such maker alone, on such judgment.

SUPREME COURT.—*Judgment of.—Petition for Rehearing.*—The action of the Supreme Court upon a petition for a rehearing is the action, not of any single judge thereof, but of the court as a unit.

From the Shelby Circuit Court.

K. M. Hord, T. B. Adams and L. T. Michener, for appellant.

C. Ewing and J. K. Ewing, for appellee.

BIDDLE, J.—Complaint in two paragraphs, by the appellee against the appellant.

The first paragraph counts upon a judgment against the

Marshall v. Stewart.

appellant, in favor of the appellee ; the second counts upon a promissory note made by appellant, payable to the appellee.

The appellant pleaded payment to the whole complaint, and a general denial ; and, to the second paragraph, a former recovery, in two special paragraphs of answer.

As no question is made upon the pleadings, we do not state them any more particularly than to show the applicability of the evidence to the case, and make the questions presented intelligible.

Trial by the court; finding and judgment for the appellee. The questions presented to this court all arise under the motion for a new trial, and the causes assigned for a new trial are :

1. That the decision is contrary to law ;
 2. That the decision is not sustained by the evidence ;
- and,
3. Error in permitting the appellee, over the objection of the appellant, to read in evidence a certain promissory note, and the record of a certain judgment upon the same note, and foreclosure of a mortgage.

1. We will first notice the objection to the introduction of the note in evidence, which was, that a suit had been brought and a judgment obtained thereon, which merged the note.

This objection was not valid. The note was the cause of action set out in the second paragraph of the complaint, and was necessary and proper evidence to sustain that paragraph. The fact that the note was merged in a judgment was matter of defence, to be proved under the answer, and could not be made the foundation of an objection to the introduction of the note as evidence under the complaint.

2. The objection made to the introduction of the record

Marshall v. Stewart.

of a former recovery on the note as evidence was, that it did not show a former suit between the appellee, as plaintiff, and the appellant, as defendant, but a suit between the appellee, as plaintiff, and the appellant and Susan D. Marshall, his wife, as defendants. The note, however, which was the foundation of the action in the record offered, was executed solely by the appellant, and the judgment rendered in the proceedings upon the note was solely against the appellant. It was, therefore, a judgment in favor of the appellee and against the appellant, corresponding with the judgment set out in the first paragraph of the complaint, and was properly admitted as evidence, but whether sufficient to prove the case must be further considered.

It is conceded that the note, which is the cause of action described in the second paragraph of the complaint, is the same note as that which was the cause of action in the judgment described in the first paragraph of the complaint. The appellant insists that the record described in the first paragraph of the complaint does not show a judgment against him, but only a judgment against the property mortgaged as shown by the record, and therefore can not be the foundation of a personal action; and also insists that the note is merged in the judgment described in the first paragraph of the complaint, and for that reason will not sustain the cause of action described in the second paragraph of the complaint, and therefore that the decision is not sustained by the evidence.

The judgment in the proceedings, offered in evidence under the first paragraph of the complaint, is rendered in the following words:

“It is therefore considered by the court that the plaintiff recover of said defendant, Jasper N. Marshall, the sum of one thousand and seventy-six dollars and sixty cents (\$1,076.60), as and for his damages herein, together with the costs and charges by him in this behalf laid out and ex-

Marshall v. Stewart.

pending, to be levied and collected without any relief from valuation or appraisement laws, and to bear ten per cent. interest until paid, according to the tenor and effect of said note."

After rendering the judgment as above, the court proceeded to render a decree for the foreclosure of the mortgage, and a sale of the property mortgaged, to pay the judgment, and further decreed, that, in the event said mortgage property should not sell for a sufficient sum fully to pay off and satisfy plaintiff's said judgment, interest and costs, then the sheriff aforesaid shall levy upon and sell, without relief from valuation or appraisement laws, any other property of the defendant, Jasper N. Marshall, subject to execution, to make up such deficiency.

But subsequently, at the same term, the court, upon motion, struck out the latter part of the decree, awarding execution for the deficiency, if any, thus leaving the record showing only a judgment against the appellant, and the decree of foreclosure of the mortgage and sale of the property to pay the judgment.

Was the note described in the second paragraph of the complaint merged in the judgment given in evidence under the first paragraph of the complaint? We think it was. The record shows a final judgment between the parties upon the note; a judgment upon which, doubtless, the plaintiff was entitled to his order to sell the mortgaged property, and also to his execution to make up any deficiency that might be due after the sale of the mortgaged property. The fact that the court did not finally direct that any deficiency should be levied of any property of the mortgage debtor can not affect the question of merger, nor the validity of the judgment. For the doctrine of merger, see *Freeman Judgments*, secs. 215, 216, 217; *Fischli v. Fischli*, 1 Blackf. 360; *Archer v. Heiman*, 21 Ind. 29; *Root v. Dill*, 38 Ind. 169; *Lapping v. Duffy*, 47

Marshall v. Stewart.

Ind. 51; *The First National Bank of Indianapolis v. The Indianapolis Piano Manufacturing Co.*, 45 Ind. 5; *Needham v. Gillespy*, 49 Ind. 245; *Gould v. Hayden*, 63 Ind. 443.

We can not concur with the appellant's view that the judgment is merely for a foreclosure of the mortgage and the sale of the property. It appears to us to be a valid judgment on the note, and one upon which an action will lie. If the judgment is not upon the note and valid, the note is not merged. *Freeman Judgments*, sec. 218; *Mico v. Morris*, 3 Lev. 234; *Adney v. Vernon*, 3 Lev. 243; *Briscoe v. Stephens*, 9 Moore, 413; *Goodrich v. Bodurtha*, 6 Gray, 323; *Wixom v. Stephens*, 17 Mich. 518; *Davidson v. Nebaker*, 21 Ind. 334; *Campbell v. Cross*, 39 Ind. 155; *Lipperd v. Edwards*, 39 Ind. 165.

We have thus decided the questions made by the parties in their briefs, but it does not seem to us material to the decision of this case whether we hold the judgment valid or invalid, or whether the note is merged or not merged; for, if the judgment is not on the note and valid, the note is not merged, and is therefore a good cause of action, and will sustain the judgment upon the second paragraph of the complaint, and, if the judgment is valid and the note merged, the judgment can be sustained upon the first paragraph of the complaint.

The judgment is therefore affirmed, at the costs of the appellant.

PETITION FOR A REHEARING.

BIDDLE, J.—The counsel for appellant still insist, that the judgment set out in the first paragraph of the complaint is insufficient to support an action, because there is no express judgment to collect the residue, if the mortgaged property fails to pay the debt. It is true there is no such judgment over; it is also true that the whole judgment is personal. The cases cited against the opinion in this case are all cases where the judgment was upon the mortgage

Marshall v. Stewart.

alone, or where the proceedings and judgment were solely *in rem*. In such cases the judgment will not support an action against the person, for it is not a personal judgment. There is nothing in the opinion contrary to this view.

The record of the judgment counted upon in the first paragraph of the complaint shows the finding of the court, in the following words :

“ And the evidence being heard, and the court, being sufficiently advised in the premises, finds that the defendant, Jasper N. Marshall, is indebted to the plaintiff on and by his promissory note mentioned in the complaint, in the sum of one thousand and twenty-one dollars and sixty cents, principal and interest now due thereon, and in the further sum of fifty-five dollars as a reasonable attorney's fee for the institution of this suit.”

The judgment of the court on this finding is set out in the original opinion, and need not be repeated here ; and why it is not a personal judgment, instead of a judgment *in rem*, does not appear upon its face, and has not been shown to us. We can not understand any of the authorities cited by appellant, as being in his favor ; indeed, it seems to us that some of them are directly against him. *Fletcher v. Holmes*, 25 Ind. 458 ; *Lipperd v. Edwards*, 39 Ind. 165. Besides, the judgment being personal, an execution could issue without an express order in the judgment, and upon the decree the residue might be collected.

The counsel for appellant urge it upon us, that,

“ In consideration of the magnitude of the question involved, we respectfully ask that this petition and argument for a rehearing be considered by the full bench.”

It surely can not be unknown to the counsel that this court is a unit, though composed of five judges, and that it decides no case, petition or motion, and does no judicial act—not even to the formal admission of a gentleman of

Tracy v. Quillen et al.

the bar to practise before it—except as a court. Such an appeal therefore is quite unnecessary.

The petition for a rehearing is overruled.

Original opinion filed at November Term, 1878.

Opinion on petition filed at May Term, 1879.

TRACY v. QUILLEN ET AL.

PRINCIPAL AND SURETY.—*Extension of Time of Payment Indefinitely.—Promissory Note.*—An agreement for an extension, for an indefinite period, of the time of payment of a promissory note, made between the holder and principal without the knowledge or consent of the surety, will not discharge the latter, though founded upon a valuable consideration.

SAME.—*Dismissal of Action.*—An agreement between the holder and principal, that the former will dismiss an action pending on the note against both principal and surety, and make a credit on the note, will not discharge the surety, though made without his knowledge and consent and for a valuable consideration.

SAME.—*Complaint for New Trial.—Surprise.—Excusable Neglect.*—A complaint by the surety for a new trial, upon the ground, that, because of "surprise" and "excusable neglect" on the former trial, he had failed to plead and prove an alleged agreement between the plaintiff and the principal, for an extension of the time of payment indefinitely, is insufficient.

From the Montgomery Circuit Court.

L. Wallace and G. D. Hurley, for appellant.

A. C. Jennison, W. P. Britton and M. W. Bruner, for appellees.

NIBLACK, J.—The complaint in this proceeding was as follows:

"Basil Tracy respectfully represents, that a suit was begun in the said [Montgomery] Circuit Court, complaint filed October 25th, 1875, by James T. Quillen, plaintiff, against Basil Tracy, James Steele and Samuel Harlow, defendants; that said suit was upon a note for one thousand dollars, a copy of which is filed herewith as a part of

Tracy v. Quillen et al.

this petition, marked 'Exhibit A;' that the complaint showed the indebtedness at that time to be eight hundred and sixty-nine dollars and sixty-five cents; that he, Tracy, employed John T. Bunch, attorney, to manage his defence; that the said defence was, substantially, that the note was executed to Quillen by Harlow, as principal, and [the said] Steele and this petitioner as sureties; that afterward the said Quillen agreed with the said Harlow, for a valuable consideration, to give the said Harlow an extension of time for the payment of said note, of which extension the said petitioner had no notice, neither did he consent thereto; that said Bunch had a conversation with said Harlow, before the trial was entered upon, and was told by said Harlow that the agreement for the extension of time of payment of said note was verbal, upon which understanding said Bunch went to trial; that, upon the trial, said Harlow, being called as a witness for petitioner, on cross-examination said the said agreement for the extension of time of payment was in writing; that all the terms in connection with the matter were embraced in a written agreement; that, upon said statement of the said Harlow, the cause was concluded adversely to this petitioner, and a judgment rendered against him for \$——.

"Petitioner further says, that he and his said attorney were wholly taken by surprise, and wholly unprepared to make the defence upon the ground of a written agreement for the said extension of time, as they would have done had they not been informed and understood that the said agreement was verbal.

"Petitioner further says, that he has a good defence to said suit, substantially as above stated; that he will be able to prove, upon a new trial, that the said Quillen did, for a valuable consideration, shown in an agreement in writing, a copy of which is filed herewith, and made part of this petition, marked 'Exhibit B,' agree to dismiss a suit already

begun on said note, and did actually dismiss the same at the April term of said circuit court, 1875; that the said note was not again put in suit until the November term of said court, 1875. Petitioner further states that he will prove conclusively, by said Quillen and said Harlow, that the said extension was given without his knowledge or consent. He will also show by the agreement, that the agreement was founded upon a valuable consideration; also, that there was a verbal understanding between said Quillen and Harlow, covered by the same consideration, that the said extension of payment should be until said Harlow could gather his harvest for the year 1875. Petitioner further states, that, on account of said understanding of said Bunch that the agreement was verbal instead of in writing, the said Bunch excusably neglected to draw the answer to the complaint upon the agreement in writing and [to] take steps to have the same produced by the opposite party, as evidence upon the trial. Wherefore, because of said surprise and excusable neglect, petitioner prays that he may, by proper order of the said court, be relieved from the judgment taken against him upon the trial of said cause, at the November term of [said] circuit court, 1875, that he may have a new trial of the cause, and such other relief as to the court may seem proper in the premises."

The copy of the agreement filed with the complaint, and referred to as "Exhibit B," was as follows:

"This article of agreement, between James T. Quillen and Samuel Harlow, witnesseth, that the said James T. Quillen, for and in consideration of Samuel Harlow and wife executing to James T. Quillen a warranty deed, in fee-simple, of certain lands heretofore conveyed by said Quillen to said Harlow, and by said Harlow mortgaged to said Quillen, a more particular description of which is contained in said mortgage, executed on the 2d day of April,

Tracy v. Quillen et al.

1874, to secure the purchase-money to said Quillen, and also in consideration of the agreement of said Harlow to give peaceable possession of said lands on the 1st day of November, 1875, the said James T. Quillen hereby agrees to dismiss both his suits against said Harlow and others, being numbered 1946 and 1947, on the docket of the Montgomery Circuit Court, April term, 1875, and to pay all costs accrued in the same, and also to give a credit of three hundred dollars, less the amount of costs in said suits, on the note of one thousand dollars (\$1,000) sued on in case No. 1947; and said Quillen agrees, further, to deliver to said Harlow the mortgage note, and to release in full the mortgage sued on in 1946. And the said Harlow hereby agrees to convey said lands, as described in said mortgage, by a good warranty deed, executed by himself and wife, to James T. Quillen; and further agrees to yield peaceable and quiet possession of said lands, on the 1st of November, 1875, and also to give Quillen the privilege of seeding whatever lands he wishes to seed this fall; also, to have all the wheat straw of the present crop, said Quillen stacking it himself. And said Harlow is to include in said conveyance to said Quillen all lumber now situated on the lands conveyed, and Harlow agrees not to commit waste of any kind on said land; Harlow to have said lands free of rent till the said 1st day of November, 1875, and to pay all taxes assessed on said lands for the year 1875.

"In witness whereof we have hereunto set our hands and seals, this 17th day of May, A. D. 1875.

"JAMES T. QUILLEN,

"SAMUEL HARLOW."

The defendant Quillen demurred to the complaint, for want of sufficient facts, and the court sustained his demurrer.

The plaintiff, Tracy, failing and refusing to plead further, final judgment was rendered against him, in favor of all the defendants.

Tracy v. Quillen *et al.*

The complaint shows that Harlow, on his cross-examination concerning the alleged agreement to extend the time for the payment of the note known as "Exhibit A," stated "that all the terms in connection with the matter, were embraced in a written agreement," referring, as the inevitable inference is, to the written agreement above set out.

The complaint also avers, in substance, that Tracy could, upon another trial, prove by both Quillen and Harlow, "that there was," in addition to the written agreement, "a verbal understanding between said Quillen and Harlow, covered by the same consideration, that the said extension of payment should be until said Harlow could gather his harvest for the year 1875." But if, in point of fact, there was such an understanding, which is not directly averred, why did not Tracy prove its existence by either Quillen or Harlow, or both of them, upon the former trial? Nothing is alleged as to the state of the issues, or otherwise, to explain or excuse the omission to make this proof upon the former trial. If such proof were not competent, then how could it be made competent by setting up the written agreement in defence upon a new trial, as Tracy alleges he desires to do? It seems to us not to be sufficiently shown by the complaint, that it would be competent to prove the existence of such an additional "verbal understanding" between Quillen and Harlow, if a new trial were granted.

As we construe the allegations of the complaint, the important and controlling question in this case appears to be, would the stipulations contained in the written agreement above referred to exonerate Tracy as a surety on the note sued on at the former trial, if the question were reopened, and another trial granted? If not, then Tracy could not, upon another trial, found a defence upon it, and the "surprise" of which he complains was an immaterial one to his defence.

Tracy v. Quillen *et al.*

It is well settled in this State, that the extension of time for the payment of a note does not exonerate the surety, unless the extension is not only upon a valid consideration, and without the consent of the surety, but is also for a definite period of time. *Jarvis v. Hyatt*, 43 Ind. 163; *Hogshead v. Williams*, 55 Ind. 145; *Buck v. Smiley*, 64 Ind. 431. There are still other authorities to the same effect.

We see nothing in the written agreement that restrained Quillen from renewing his suit on the note upon which the judgment complained of was rendered, for any definite or appreciable time. It is true, that, upon the performance by Harlow of his part of the agreement, a credit was to be entered on the note as a payment, but that did not restrain Quillen from commencing a new suit on the note immediately, if he chose to do so.

In our opinion, therefore, the stipulations contained in this written agreement, however well pleaded, would not have constituted a valid defence for Tracy upon the former trial, and hence could not be made available as a defence for him, if a new trial were granted. The complaint was, in consequence, obviously bad for not disclosing a meritorious defence to the action in which the judgment sought to be set aside was rendered.

Other questions, touching the sufficiency of the complaint, have been discussed by counsel, but as what we have said shows the complaint to have been, at all events, fatally defective, it is quite unnecessary for us to further inquire whether the complaint might or might not have been in other respects sufficient.

The judgment is affirmed, at the costs of the appellant.

Heaton v. Knowlton et al., Executors.

HEATON V. KNOWLTON ET AL., EXECUTORS.

DECEDENTS' ESTATES.—*Final Settlement, Pending Appeal to Supreme Court by Adverse Party.—Reopening of.*—The final settlement of a decedent's estate, during the pendency of an appeal to the Supreme Court by a party against whom a judgment has been rendered in favor of the estate, without making provision under sec. 115, 2 R. S. 1876, p. 587, for payment of whatever may finally be determined as due to such party, is in violation of sec. 112, 2 R. S. 1876, p. 585, and is invalid; and, upon a reversal of such judgment, and the rendition of a judgment in favor of such party, such settlement may, under sec. 116, 2 R. S. 1876, p. 587, be set aside, on petition by such party within three years after such settlement is made.

SAME.—*Appeal Bond.—Supersedeas.*—The fact that no appeal bond was filed, and no supersedeas or order staying proceedings was procured during such appeal, is no defence to such petition.

SAME.—*Answer.—Reinstatement of Appeal Dismissed.—Notice.*—An answer to such petition, alleging that such appeal had been dismissed for the failure of such party to file a brief, and that, on reinstatement thereof, no notice of the reinstatement had been given to the estate, is insufficient.

SAME.—*Notice of the motion for reinstatement is all the notice to which the appellee is entitled.*

SAME.—*Jurisdiction of Circuit Court.—Statute Construed.*—Since the taking effect of the act abolishing common pleas courts, the circuit court has original jurisdiction of a petition to reopen a final settlement, and sec. 116, *supra*, should be so construed.

From the Shelby Circuit Court.

J. S. Scobey, for appellant.

J. Harrison and A. Blair, for appellees.

Howk, J.—At the March term, 1877, of the Shelby Circuit Court, the appellant, Thomas Heaton, filed in open court his petition, duly verified, wherein he alleged, in substance, that, on the 25th day of October, 1873, a judgment was rendered in said court against him for costs, in a suit by him against the executors of the estate of Ephraim Knowlton, late of Shelby county, deceased, to wit, Stephen Knowlton and Christian Mohr; that from said judgment the appellant took an appeal to this court, to which appeal the appellees appeared and filed their brief therein; that, at the November term, 1876, of this court,

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Heaton v. Knowlton et al., Executors.

the said judgment of the said Shelby Circuit Court was reversed, and the said circuit court was instructed to render judgment for said Heaton on the special findings of the jury, notwithstanding their general verdict; that the amount due the appellant in said action was the sums due on the two notes sued on therein, and all the costs in said action, both in the circuit court and in this court, and the sum paid by the appellant for the transcript on said appeal, specifying particularly each of said sums or amounts; that said action on said notes was commenced against said Ephraim Knowlton, in his lifetime, but after his death it was prosecuted against the appellees herein, as his executors, both in the circuit court and in this court; that, with said action thus pending, to which the appellees had appeared in this court, at the time of such appeal, the appellees, as such executors, at the May term, 1875, of the court below, pretended to make a final settlement of their testator's estate, without the payment of the appellant's said claim, and without making any provision for the payment thereof, and that the said claim, with interest, and all costs, were yet due and wholly unpaid; that the said appeal was duly prayed and granted, and was duly perfected in this court by the filing of the transcript therein, within the time limited by law, to which appeal the appellees appeared and filed their brief, and submitted the cause to this court for decision; and that afterward, with full knowledge that said cause was so pending on appeal, and was submitted to this court for decision, the appellees proceeded to have said estate settled in the court below, against the appellant's rights, and in fraud thereof and of the law in such case made and provided. Therefore the appellee prayed the said circuit court to set aside the said final settlement, and compel the appellees, as such executors, to pay the appellant's said claim, with all interest and costs in said case, and for other proper relief.

The appellees appeared to the appellant's petition, and

answered the same in two paragraphs, the first of which was a general denial, and the second was a special or affirmative defence.

To the second paragraph of said answer the appellant demurred, upon the ground that it did not state facts sufficient to constitute a defence to his petition, which demurrer was overruled by the court, and to this ruling he excepted.

The appellant moved the court to strike out certain specified parts of said second paragraph of answer, which motion was overruled, and he excepted to this decision, and filed his bill of exceptions. He then replied, in two paragraphs, to the second paragraph of said answer.

The issues joined were tried by the court without a jury, and a finding was made for the appellees, denying the prayer of the appellant's petition, and refusing to set aside the final settlement of said estate. The appellant's motion for a new trial was overruled, and his exception was entered to this ruling, and the court rendered judgment upon and in accordance with its finding, from which judgment this appeal is now here prosecuted.

The appellant has here assigned, as errors, the following decisions of the circuit court :

1. In overruling his motion for a new trial ;
2. In overruling his demurrer to the second paragraph of the appellees' answer ;
3. The court, on its finding of the facts, ought to have rendered judgment in his favor ; and,
4. The judgment of the court was contrary to the law and the evidence.

We will first consider and decide the questions presented by the second of these alleged errors, namely, the overruling of the appellant's demurrer to the second paragraph of the appellees' answer.

In this second paragraph of answer, the appellees sub-

Heaton v. Knowlton et al., Executors.

stantially admitted all the allegations of fact, in the appellant's petition, but, in addition thereto, they alleged, in substance, that the appellant did not, on his said appeal to this court, file any appeal bond, nor did he, at any time during the pendency of said appeal, obtain from this court or any judge thereof any order or supersedeas, staying proceedings on the judgment of the circuit court against him, in favor of the appellees, for costs; that, on the 27th day of July, 1874, the said appeal was dismissed by this court on account of the appellant's failure to comply with rule 14 of said court, and notice of such dismissal, issued by the clerk of said court, was filed in the clerk's office of the court below on the 30th day of July, 1874; that, on the 8th day of December, 1874, the record was re-filed and the appeal was reinstated in this court by the clerk thereof; that, after such re-filing and reinstatement of said cause, no notice thereof was given to the appellees, or either of them, nor was their appearance entered, either in person or by their counsel; that the final settlement of their testator's estate, on the 7th day of June, 1875, was made by the appellees in good faith, and with the assent, acquiescence and approval of the judge of the circuit court, and before the reversal of their judgment against the appellant for costs by this court; that the appellees had fully paid all the debts and claims pending in said circuit court at the time of said settlement, including the widow's statutory allowance and the charges of administration, and all claims in favor of said estate had been disposed of according to law, and that there were no other personal assets in their hands or within their knowledge or control, belonging to said estate.

We are clearly of the opinion that the facts alleged in this second paragraph of answer were not sufficient to constitute any valid defence to the appellant's petition, or to justify the court in denying him the relief prayed for therein. It will be observed that the appellees have very cautiously

denied their notice or knowledge of the fact that the appellant's former appeal to this court, after its dismissal for the appellant's failure to file a brief within the time limited by a rule of the court, had been reinstated in this court. They have alleged, that, after the reinstatement of said appeal, no notice was given to them, or either of them, of such reinstatement; but they failed to allege that they had no notice of the appellant's application or motion for the reinstatement of said appeal, before such application or motion was made in this court. This latter notice was the only notice they were entitled to, and this notice they have failed to allege, in this paragraph of answer, that they did not receive. The record elsewhere shows that the appellees had written notice of the appellant's application or motion for the reinstatement of said appeal, some time before it was presented to or acted upon by this court. This was all the notice that the appellant could be required to give, or the appellees were entitled to expect or receive; and, having received and acknowledged the receipt of written notice of the appellant's application or motion for the reinstatement of said appeal, they were bound to take notice of the action of this court thereon, without notice of such action.

The appeal of the appellant's claim against the estate of the appellees' testator was duly reinstated in this court upon notice and motion, as it seems to us; and there was no allegation of fact, in the second paragraph of the answer, which was necessarily in conflict with this view of the case. The cause was thus reinstated, and was a pending claim against said estate, in this court, for six months before the attempted final settlement of said estate. It was not necessary to the pendency of the appellant's claim against said estate, that he should have given any appeal bond upon his appeal, nor that he should have sued out, from this court or any judge thereof, any *supersedeas* or or-

Heaton v. Knowlton et al., Executors.

der staying proceedings on the appellees' judgment against him for costs. Whether either of these things were done by the appellant or not, we think that his appeal was a pending appeal, and that his claim was a pending claim against said testator's estate, which the appellees were bound to take notice of and make provision for, in any settlement of said estate. In section 115 of "An act providing for the settlement of decedents' estates," etc., approved June 17th, 1852, it is provided, that, "If at the time of final settlement of such estate any claim is pending against it unallowed, and the creditors, legatees, or heirs will execute to the approval of the claimant bond with penalty and surety, to pay the amount of his claim, if it be allowed, such estate shall be finally settled." 2 R. S. 1876, p. 537.

At the time the appellees made their final settlement of their testator's estate, the appellant's claim was pending against it unallowed, and no creditor, legatee or heir executed to his approval "bond with penalty and surety, to pay the amount of" the appellant's claim, if it should be allowed. It is quite clear, therefore, that the appellees' final settlement of their testator's estate, as against the appellant and his said claim then pending and unallowed, was illegally made. It is very clear, also, that the appellant, as a creditor, was interested in said estate, and that the appellees, through mistake or fraud, made their final settlement of said estate before any provision had been made for the payment of the appellant's claim, if it should be allowed. It follows, therefore, that the appellant had the right, under section 116 of the decedents' estates act, before referred to, to have the appellees' final settlement of said estate reopened or set aside, his petition therefor having been presented to the circuit court "within three years after said settlement." Since the enactment of the act of March 6th, 1873, by which courts of common pleas were abolished, and the circuit courts were clothed with

original instead of appellate jurisdiction in the final settlement of decedents' estates, that portion of said section 116 of the decedents' estates act which provided that "no final settlement shall be revoked or reopened, except by appeal to the circuit court, and the same shall there appear to have been illegally made," must now be construed, as it seems to us, as giving the circuit court original jurisdiction, and as making it the duty of that court to revoke or reopen the final settlement of an estate, when it shall there appear to have been illegally made. The appellees were clearly prohibited, by section 112 of the decedents' estates act, from making a final settlement of their testator's estate, while the appellant's claim was pending against it, unallowed and undisposed of; and, of course, their final settlement was illegally made. 2 R. S. 1876, p. 535; *Reed v. Reed*, 44 Ind. 429.

The court erred, we think, in overruling the appellant's demurrer to the second paragraph of the appellees' answer. Having reached this conclusion in regard to the insufficiency of the second paragraph of the answer, which necessarily leads to a reversal of the judgment, it is unnecessary, perhaps, for us to consider any of the other alleged errors. We have, however, very carefully considered the evidence in the record, and the facts established thereby, and in our opinion the finding of the court was not sustained by the evidence, and therefore we hold, that the court also erred in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellees' costs, and the cause is remanded with instructions to sustain the appellant's demurrer to the second paragraph of the appellees' answer, and for further proceedings in accordance with this opinion.

Ferris et al. v. Cravens et al.

FERRIS ET AL. v. CRAVENS ET AL.

FORECLOSURE OF SCHOOL-FUND MORTGAGE.—*Remedy.*—*Merger.*—*Sheriff's Sale.*—*Sale by County Auditor.*—*Appraisement.*—*Appraisers.*—*Action to Recover Land.*—*Special Findings.*—In an action to recover the possession of real estate, the court found specially, that, on January 26th, 1849, the defendant's grantor executed a school-fund mortgage on the land, which was duly recorded on that day; that, on March 1st, 1859, a judgment for the amount of the debt, and a decree foreclosing such mortgage, were rendered in an action thereon by the State on the relation of the county auditor, against the mortgagor only; that, on September 15th, 1860, such real estate was bid in, at sheriff's sale on such decree, by the county auditor; and that, on March 27th, 1871, the real estate was sold, under such mortgage, by the county auditor, to the plaintiff, without appraisement, for cash.

Held, that under sections 79, 81 and 82 of the act of March 5th, 1855, 1 G. & H. 542, the auditor might either sell the land under the mortgage, or recover judgment on the debt secured by the mortgage, or both; but this would not prevent an action to recover for the debt and to foreclose the mortgage.

Held, also, that the mortgage was merged in such decree of foreclosure.

Held, also, that, after foreclosure, the county auditor could not sell the land under the mortgage.

Held, also, that, under section 97 of the act of March 6th, 1865, 1 R. S. 1876, p. 801, a sale, by a county auditor, of lands so bid in by him, must be on a credit of five years, and for a sum not less than the appraised value thereof.

Held, also, that a sale for cash and without appraisement is invalid.

Held, also, that such appraisement should be made by three disinterested freeholders of the neighborhood.

Held, also, that the defendant was entitled to judgment on the special findings.

From the Ripley Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellants.

J. B. Rebuck, *J. O. Cravens* and *W. D. Ward*, for appellees.

WORDEN, C. J.—This was an action by John O. Cravens and William D. Ward, against Edwin P. Ferris and Jefferson Stevens, for the recovery of certain real estate in the county of Ripley.

Stevens disclaimed title, except as tenant to Ferris.

Ferris answered, and the cause was submitted to the

court for trial, who found the facts specially, and stated conclusions of law thereon, to which exceptions were taken by the defendants, and judgment was rendered for the plaintiffs.

It is assigned for error, among other things, that the court erred in its conclusions of law upon the facts found.

Enough of the facts found will be stated to develop the point upon which the case must be decided.

The defendant Ferris claimed title under one Jeremiah D. Skeen, and the plaintiffs claimed title under a sale made by the auditor of the county, by virtue of a school mortgage executed by Skeen; and the principal question arises upon the validity of the auditor's sale.

The court found, "That, on the 26th day of January, 1849, said Jeremiah D. Skeen and wife, while in possession, mortgaged said real estate to the congressional school fund of Ripley county, Indiana, to secure the sum of \$75, that day borrowed by said Skeen, payable five years after date, with seven per cent. interest, and five per cent. damages if not paid when due, and that said mortgage was duly recorded in the proper record of the recorder's office of said county, on the 26th day of January, 1849."

This mortgage was afterward foreclosed by an action in court, and the property sold under the decree, and purchased in by the auditor, as is shown by the following findings of the court:

"12. On the 9th day of August, 1858, a complaint was filed in the circuit court of Ripley county, Indiana, by the State of Indiana on the relation of Jefferson Stevens, who was then auditor of said county, against Jeremiah D. Skeen and Mary Skeen, his wife, to foreclose the school-fund mortgage given by said Skeen and wife, dated January 26th, 1849, as aforesaid. The original mortgage was filed as an exhibit with the complaint, and on the 9th day of August, 1858, a summons was issued in said cause in due form of law, and came to the hands of the sheriff of Clark

Ferris et al. v. Cravens et al.

county, Indiana, August 12th, 1858, and was served on said Jeremiah D. Skeen and Mary Skeen, on the 17th day of August, 1858; and that, on the 1st day of March, 1859, a judgment was rendered in the circuit court of Ripley county, Indiana, in said cause, against said Jeremiah D. Skeen, for the sum of \$112 $\frac{34}{100}$, and costs, and a foreclosure of said mortgage to the school fund, and an order for the sale of the property; and that the complaint, summons and service thereof, and the judgment thereon, were in due form of law, and that the foreclosure was upon the identical land set out in said mortgage, and was based upon the original mortgage executed by Jeremiah D. Skeen and wife as aforesaid, dated January 26th, 1849, as aforesaid.

"13. The court further finds, that, on the 4th day of June, 1859, John M. Stewart replevied said judgment, and on the 2d day of July, 1860, an order of sale on said decree was issued in due form of law, and was placed in the hands of the sheriff of Ripley county, Indiana, on the 3d day of July, 1860, and that the said sheriff advertised said land for sale on the 15th day of September, 1860, in due form of law; and on said 15th day of September, 1860, at the door of the court-house in Versailles, Ripley county, Indiana, George Bonham, who was then sheriff of said county, in due form of law offered for sale the real estate set out in said mortgage to the school fund, dated January 26th, 1849, as aforesaid; and Benjamin F. Spencer, who was then auditor of said Ripley county, Indiana, bid the sum of \$167 $\frac{86}{100}$ for said real estate, and the same was by the said sheriff struck off to him; and the sheriff made return of the facts aforesaid, and returned the execution by order of said auditor, and that the costs endorsed on the back of said order of sale amounted to the sum of \$31 $\frac{13}{100}$."

The finding proceeds to state that afterward, on the 27th day of March, 1871, the principal and interest due on the original mortgage being one hundred and seventy-three dol-

lars and fifteen cents, including five per cent. damages, and costs, Philip F. Seelinger, then auditor of the county, having given notice, etc., proceeded to sell the real estate mentioned in the mortgage, at public sale, and struck off and sold the same to John O. Cravens and William D. Ward, the plaintiffs in this action, for cash and not on credit, and without, so far as appears, any appraisement. A deed was made by the auditor to the purchasers at this sale. A full detail of the steps taken in making this sale is set out in the finding, with a view, as we suppose, to objections urged to the regularity of the sale; but, as we think, for reasons to be stated, that the sale was void for want of power in the auditor to make it, we need not set out the details more fully.

This sale by the auditor the court below held to be valid. In this we think the court erred. We regard the sale, and the deed in pursuance of it, as entirely void. No title, therefore, passed to the plaintiffs by virtue thereof; and, as they showed no title from any other source, judgment should have been rendered for the defendants.

We proceed to state the ground on which we hold the auditor's sale to be void:

The 79th section of the act of March 5th, 1855, 1 G. & H., p. 542, which was in force at the time the foreclosure proceedings were had, provided that—

“When the interest or principal of any such loan shall become due and remain unpaid, the auditor shall proceed to collect the same by suit on the note, or by sale of the mortgaged premises, or both, at his option; he may also, by suit, recover possession of the mortgaged premises before sale thereof.”

The act further provides for a sale of the mortgaged premises, upon notice, without going into court to foreclose the mortgage. Secs. 81, 82. The auditor, therefore, might have made the amount due by suit on the note, or

Ferris *et al.* v. Cravens *et al.*

by a sale of the land under the statutory power, or by both, at his option. But this did not prevent him from bringing his action in court for the recovery of the amount due, and to obtain a judicial foreclosure of the mortgage and an order for the sale of the premises. See *Deming v. The State*, 23 Ind. 416. By the action in court, he combined both remedies, by obtaining a judgment for the debt, and the foreclosure of the mortgage and a sale of the mortgaged premises.

In our opinion, the judgment of foreclosure merged and extinguished the mortgage, so that no action could thereafter have been brought upon it, nor could it have been again foreclosed by any judicial proceeding, or by sale of the premises under the statute.

A recent writer says : " The rendition and entry of a judgment or decree establishes, in the most conclusive manner, and reduces to the most authentic form, that which had hitherto been unsettled ; and which had, in all probability, depended for its settlement upon destructible and uncertain evidence. The cause of action thus established and permanently attested, is said to merge into the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it was founded, just as they would, in construing a statute, seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined, to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality ; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It 'is drowned in the judgment,' and must henceforth be regarded as *functus officio*." Freeman Judgments, 2d ed., sec. 215.

So a judgment upon which a subsequent judgment is re-

covered is merged in the latter judgment. *Gould v. Hayden*, 63 Ind. 443. See, also, *Crosby v. Jeroloman*, 37 Ind. 264, and *Ault v. Zehering*, 38 Ind. 429.

What we have said as to merger applies, of course, to cases like the present, where there has been a judgment of foreclosure for the whole amount secured by the mortgage. We decide nothing as to the effect of a foreclosure for the amount of one or more of several promissory notes secured by the mortgage, where there are others outstanding, or the like cases.

As the mortgage in this case was merged in the judgment of foreclosure, and had become *functus officio*, and, therefore, conferred no power upon the auditor to make the sale, his sale was a nullity, and no title passed thereby, or by his deed in pursuance thereof, to the purchasers.

There is another aspect of the case, that we have thought worthy of consideration in determining whether the auditor's sale might not be upheld.

It is not found that any deed was made by the sheriff on the bidding in of the land by the auditor on the foreclosure sale. Whether or not a deed was necessary, we need not determine; but, for the purpose of determining the point about to be stated, we assume that none was necessary, and that the title to the premises vested in the State for the benefit of the school fund, by the sheriff's sale and return, without a deed.

The 88d section of the statute, above cited, in force at the time the land was bid in by the auditor on the foreclosure, provided that—

“In case of no bid for the amount due, the auditor shall bid in the same, on account of the fund, and as soon thereafter as may be, shall sell the same, having first caused it to be appraised by the township trustees, on a credit of five years, interest at seven per cent. per annum, being paya-

Ferris et al. v. Cravens et al.

ble annually in advance, but no such sale shall be for a less sum than the appraised value thereof."

The same provision is contained in the 97th section of the act of March 6th, 1865, in force at the time of the auditor's sale in question, except that the appraisement is to be made by three disinterested freeholders of the neighborhood, instead of the township trustees. 1 R. S. 1876, p. 801.

Assuming that the land had been sufficiently acquired by the auditor, by his purchase at the sale on the foreclosure suit, to authorize a sale by him under the provisions of the statute last above cited, still his sale was void for want of appraisement of the land, and a compliance with the provisions of the statute in making the sale. The auditor had no power to make a sale for cash down, when the law required him to sell on a credit of five years. The land would probably sell for a much larger sum if sold on time, than if sold for cash down.

There is, therefore, no ground upon which the auditor's sale in question can be upheld.

It should be observed that it is apparent, from the facts found in reference to the auditor's sale, that it was made professedly under the original mortgage, which we have seen was merged in the judgment of foreclosure, and not under the statutory provisions last above cited. It may also be further observed, that we have not inquired whether the purchaser or purchasers from Skeen might not redeem the mortgage, they not having been made parties to the action to foreclose, that question not being involved in the case.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to render judgment for the defendants in the action, on the special finding of facts

JOHNSON v. THE STATE.

CRIMINAL LAW.—*Testimony of Accomplice.—Credibility of Witness.*—Though the testimony of a confessed accomplice should be carefully scrutinized by the court and jury trying a defendant, yet the defendant may be convicted on such testimony alone, if it be sufficiently satisfactory to the jury.

SAME.—*New Trial.—Bill of Exceptions.*—The truth of the grounds alleged in the motion as cause for a new trial must be made to appear by a bill of exceptions.

SAME.—*Record.—Evidence.*—A writing signed by the judge, and copied into a motion for a new trial, purporting to be a bill of exceptions containing questions put to the defendant, on cross-examination, while testifying as a witness, but containing no caption, and no statement that the alleged witness really had testified on the trial, forms no part of the record.

From the Owen Circuit Court.

H. Richards, A. W. Fullerton, A. T. Rose, S. M. McGregor, E. E. Rose and E. Short, for appellant.

T. W. Woollen, Attorney General, *S. O. Pickens*, Prosecuting Attorney, *W. M. Franklin, I. H. Fowler and W. Hickam*, for the State.

NIBLACK, J.—This was an indictment for arson.

The appellant, William F. Johnson, was jointly indicted with one Isaac E. Johnson, and the indictment contained two counts.

The first count charged the defendants with burning a stock of goods, wares and merchandise, belonging to the said Isaac E. Johnson, which had been insured against loss or damage by fire by the Phoenix Insurance Company of Brooklyn, with the intention of defrauding such insurance company.

The second count charged the defendants with burning a house, the property of one Finley B. Johnson, in which there was kept and stored a stock of goods, wares and merchandise, consisting of groceries, produce, drugs, medicines, paints and oils, belonging to the said Isaac E. Johnson, all of which property was insured against loss or damage by

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Johnson v. The State.

fire by the said Phoenix Insurance Company of Brooklyn, with the like intent to defraud said insurance company.

The appellant entered a separate motion to quash both counts of the indictment, but the court refused to sustain his motion.

The cause, coming on for a separate trial as to the appellant, was submitted to a jury, and a verdict was returned finding him guilty as charged in the indictment, and fixing his punishment at a fine of fifty dollars, and imprisonment in the state-prison for the term of four years.

Over a motion for a new trial, a judgment of conviction was rendered upon the verdict.

The first error is assigned upon the refusal of the court to quash the indictment.

This indictment was before us in the case of *Johnson v. The State*, ante, p. 204, and for reasons there given was held to be sufficient. We still see no objection to the sufficiency of the indictment.

The next error is assigned upon the overruling of the appellant's motion for a new trial.

Under the motion for a new trial, several questions upon the evidence have been reserved by the appellant.

Upon the trial James Viquesney testified on behalf of the State, that he and the appellant burned the house and other property alleged in the indictment to have been burned, and that he was employed by Isaac E. Johnson, above named, to assist and to co-operate with the appellant in such burning, giving details as to the circumstances connected with his employment, as well as the burning of the property.

The only evidence directly connecting the appellant with the burning rested upon the testimony of this witness, who was corroborated by other witnesses in some of his statements as to collateral matters testified to by him, but not as to his direct charge against the appellant of having

Johnson v. The State.

set fire to the house. It was both proved and admitted upon the trial, that Viquesney's character for truth and veracity was bad.

The appellant insists, that, under such circumstances, the evidence was not sufficient to sustain the verdict.

The objections urged against the testimony of Viquesney went only to his credibility as a witness, and not to his competency, and it was a question for the jury to determine what credit, if any, they would give to such testimony, under all the circumstances attending the trial of the cause. It has been decided by this court, and we think correctly, that, while it is the duty of the court and jury to carefully scrutinize the testimony of an accomplice, yet a person may be convicted on the testimony of an accomplice alone, if his testimony shall be sufficiently satisfactory to the jury. *Ulmer v. The State*, 14 Ind. 52; *Stocking v. The State*, 7 Ind. 326.

The seventh and last cause assigned for a new trial, was substantially as follows:

"That the court erred in permitting counsel for the State to ask the defendant, when a witness in his own defence, upon cross-examination, certain questions, as will appear by bill of exceptions No. 2, filed herewith, which bill of exceptions No. 2 is in these words and figures, to wit: " Then followed a series of questions, enquiring whether the appellant had not been connected with, or aided and abetted in, the commission of certain other crimes mentioned and referred to in such questions, but without stating whether the appellant answered or declined to answer the questions thus propounded to him, and then adding: "'To the propounding of each and all of said interrogatories to the defendant by plaintiff's counsel, the defendant, by his counsel, objected, for the reason that the same were irrelevant, inadmissible and immaterial, but the court overruled said objection and permitted said

Johnson v. The State.

questions to be put to the defendant, to all of which the defendant at the time excepted, and now prays that this, his bill of exceptions, may be now signed by the court, and made part of the record herein, which is now done, Jan'y 4th, 1879.

JOHN C. ROBINSON,

“J. O. C. C. [SEAL.]’

“The defendant, by his counsel, objecting to said questions and answers to go before the jury, to which ruling of the court the defendant, by his counsel, at the time excepted.”

It is quite evident that the appellant, in copying the so-called bill of exceptions into his causes for a new trial, intended that it should serve the double purpose of setting out the questions to which he objected, and at the same time verifying the fact that such questions had been propounded as therein stated. But the writing thus assumed to be copied as above has no caption or formal beginning. It does not state that the appellant testified as a witness on his own behalf upon the trial, nor that the questions objected to were put to him upon his cross-examination while so testifying, or indeed at any other time during the trial. It seems, in form, to be only the fragmentary or latter part of a bill of exceptions. It is nowhere else copied into, or referred to, in the record.

Under such circumstances we are of the opinion that this writing can not be treated as a bill of exceptions properly in the record, and consequently the seventh cause assigned for a new trial, as above set forth, presents no question for our consideration here. *Etter v. Armstrong*, 46 Ind. 197.

All the remaining questions discussed by counsel have been ruled upon and decided adversely to the appellant in the case of *Isaac E. Johnson v. The State*, *supra*, to which the reader of this opinion is referred.

We see no available error in the record.

The judgment is affirmed, at the costs of the appellant.

Potts et al. v. The State, ex rel. Morgan, Guardian, et al.

POTTS ET AL. v. THE STATE, EX REL. MORGAN, GUARDIAN, ET AL.

GUARDIAN AND WARD.—*Complaint on Guardian's Bond.*—*Relators.*—In an action by the State, on the joint relation of A., as guardian, and B., against a defaulting guardian and his sureties, on his bond, the complaint alleged that the defendants had duly executed the bond in suit; that the principal therein had duly qualified as guardian of C. and D., infants, and had received moneys belonging to his wards; that D. had died during such guardianship, leaving B. and C. as the only heirs; that such principal, at the time of such decease, had converted the moneys of D. to his own use, and had been removed from his trust, and thereupon A. had been appointed guardian of C.; and that such guardian had failed to pay over any of D.'s estate to the relators or to any one entitled thereto.

Held, on demurrer, that the complaint, though uncertain, is sufficient.

Held, also, that the guardian was a proper relator.

PRACTICE.—*Misjoinder of Parties.*—*Demurrer.*—A misjoinder of parties is not a ground of demurrer.

From the Dubois Circuit Court.

L. Barbour and J. H. Laird, for appellants.

PERKINS, J.—Suit on a guardian's bond. We set out the complaint:

"The State of Indiana, on the relation of Ollie Penn and Harrison Morgan, Guardian of John W. Sullivan, minor heir of Manoah Sullivan, deceased; plaintiff, complains of John L. Potts, Pleasant E. Hoffer and Clement Doane, and says, that, on the 12th day of August, 1868, said defendant John L. Potts was duly appointed guardian of John W. Sullivan and Mahala Sullivan, minor heirs of Manoah Sullivan, deceased; that he duly qualified, executed bond, and entered upon the discharge of his duties; that defendants Hoffer and Doane were his sureties on said bond; that the bond was conditioned that said Potts should faithfully discharge his duties as the guardian of John W. Sullivan and Mahala Sullivan, minor heirs of Manoah Sullivan, deceased, a copy of which bond was made part of the complaint; that afterward, and during his continuance in office as such guardian, he received

Potts et al. v. The State, ex rel. Morgan, Guardian, et al.

and became chargeable with one thousand dollars belonging to his said wards; that, on the 2d day of March, 1870, said Mahala Sullivan departed this life, leaving, as her only legal heirs, said Ollie Penn and John W. Sullivan, surviving ward of said guardian, Harrison Morgan; that, on the death of said ward, Mahala Sullivan, viz., upon the 2d day of March, 1870, said John L. Potts, guardian as aforesaid, had in his hands, belonging to the estate of said two wards, one-half belonging to each of said wards, the sum of three hundred and seventy-one dollars and five cents; that the said relatrix, Ollie Penn, inherited and was entitled to one-half of the estate of said ward, Mahala, viz., the sum of ninety-two and seventy-seven hundredths dollars, which said amount said defendant John L. Potts had, at the time of the death of said Mahala, converted to his own use and benefit; that the remainder of the estate of said ward Mahala descended to, and was vested in, said ward, John W. Sullivan, which said sum said defendant Potts had, at the time, converted to his own use and benefit; that said defendant John L. Potts was, on the 24th day of October, 1873, ordered by the Dubois Circuit Court, on the petition of Litschgi and Friedman, to execute a new bond, as guardian as aforesaid, within twenty days, and on failure that he should be removed, etc.; that he did not execute said bond within the time, and was therefore removed; that said relator, Harrison Morgan, is now the duly appointed guardian of said John W. Sullivan, who is under the age of twenty-one years; that said relatrix, Ollie Penn, is the mother of said deceased ward, Mahala Sullivan. The plaintiff avers, that there has been a breach of the condition of the bond sued on of said Potts, in this, to wit: That said Potts received into his hands, as such guardian, one thousand dollars, which he converted to his own use, and has not accounted for and paid over to the relatrix or relator, or either of them, nor

Potts et al. v. The State, ex rel. Morgan, Guardian, et al.

to any person authorized to receive the same, said sum of money, nor any part thereof; that said Potts failed to obey the order of the court to file a new bond, and to account," etc.

"Wherefore judgment is prayed for the plaintiff for the benefit of the relator and relatrix, in the amounts due them respectively," etc. Exhibits were filed with the complaint. Potts and Hoffer made default.

There was no motion asking that the complaint be made more certain, nor any ground of demurrer assigning and pointing out wherein there were defects of parties.

Doane demurred to the complaint, assigning as causes :

1. Want of facts to constitute a cause of action ;
2. Misjoinder of parties plaintiffs ;
3. Misjoinder of parties defendants ; and,
4. Pendency of another action for the same cause.

The demurrer was overruled, and defendant Doane excepted. Said defendant then answered ; issues were formed by a reply ; trial by the court ; judgment for the plaintiff ; appeal.

The assignment of errors is as follows :

1st. The court erred in overruling the demurrer to the amended complaint ;

2d. In sustaining demurrers to the first, second, third, fourth and sixth paragraphs of answer ;

3d. In overruling the motion for a new trial.

No brief has been filed on the part of the appellees.

The appellant Doane, in his brief, makes two points :

1. That the complaint was bad ; and,
2. That the guardian was not a proper relator in the suit.

The complaint stated facts sufficient to constitute a cause of action.

By the form of a guardian's bond, given in the statute, such bond is made payable to the State, 2 R. S. 1876, p.

Potts et al. v. The State, ex rel. Morgan, Guardian, et al.

588; and section 4, on p. 587, requires the bond to be made payable to the State, as does section 19, p. 500, of the same volume, in cases of the bonds of executors and administrators; and section 7, p. 36, of the same volume, declares that suits on such bonds shall be in the name of the State. Suits may properly be maintained on such bonds, in the name of the State, on the relation of the injured party. The cases in our reports, to this point, are too numerous for citation. See, particularly, *Jackson v. Rounds*, 59 Ind. 116.

In other cases, a guardian may sue in his own name, to recover a debt due his infant ward.

The statute does not specify misjoinder of parties as a cause of demurrer. 2 R. S. 1876, p. 56, *et seq.*

The provision of the statute is, that, "when it appears upon the face" of the complaint,—

Either that the court has no jurisdiction;

Or that the plaintiff has not legal capacity to sue;

Or that there is another action pending between the same parties for the same cause;

Or that there is a defect of parties, plaintiff or defendant;

Or that the complaint does not state facts sufficient, etc.

Or that several causes of action have been improperly united,—a demurrer may be sustained.

And it declares that for no other cause shall a demurrer be sustained.

Demurrers are addressed to what appears on the face, severally, of pleadings.

As to misjoinder of parties, see notes on p. 58, 2 R. S. 1876.

The complaint did not show another action pending.

We have noticed the points presented by counsel.

The judgment is affirmed, with costs and five per cent. damages.

COX v. BIRD ET AL.

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PRACTICE.—*Motion to Strike Out.*—*Supreme Court.*—Error in overruling a motion to strike out irrelevant or redundant matter in a pleading is not available in the Supreme Court.

SAME.—*Defect of Parties.*—*Demurrer.*—An objection to a complaint, on the ground that it appears on its face that there is a defect of parties plaintiffs or defendants, is not presented by a demurrer for insufficiency, but must be presented by demurrer assigning such defect as cause.

EVIDENCE.—*Will.*—*Action to Set Aside Sheriff's Sale and Vacate Judgment.*

—*Heirs.*—In an action by heirs, to have a certain judgment against their ancestor and another, and a sheriff's sale of the ancestor's lands on an execution thereon, set aside, the plaintiffs gave in evidence a will devising the real estate in question to the ancestor "when she shall become of lawful age," and providing that "if, however, she should die before she arrives of lawful age of twenty-one years, then, in that case, the above property shall descend or fall to" the judgment codefendant.

Held, that, without proof that the ancestor attained her majority before her death, the plaintiffs showed no right of action in themselves.

From the Madison Circuit Court.

C. D. Thompson, for appellant.

H. D. Thompson, for appellees.

Howk, J.—This was a suit by the appellees, against the appellant, wherein they sought to have a former judgment of the Madison Circuit Court, and the proceedings had thereunder, declared to be illegal, fraudulent and void, and their title quieted to certain real estate, particularly described, in Madison county, Indiana.

In their complaint, the appellees alleged, in substance, that, on the 1st day of February, 1867, one Nancy J. Griffith was the owner of said real estate, and that she never sold nor conveyed the same, during her life; that, on the 1st day of June, 1867, the said Nancy J. Griffith was, and during her life continued to be, a non-resident of the State of Indiana, and a resident of the State of Illinois; that, on the 13th day of October, 1868, the said Nancy J. Griffith was a minor, under the age of twenty-one years, and

Cox v. Bird et al.

was on that day legally joined in marriage with the appellee William L. Bird, and continued to be his wife till the 25th day of September, 1873, when she died intestate, leaving surviving her the appellee William L. Bird, her widower, and the appellee Annie Bird, the only issue of said marriage and her only child, as her only heirs at law, the said Annie being a minor under the age of twenty-one years; that, on the 6th day of August, 1869, the then sheriff of said Madison county sold the south half of said real estate described in said complaint, to one Dudley Doyle, and issued to him a certificate of said sale, which said certificate the said Doyle, by his written endorsement, assigned to the appellant on the 17th day of September, 1869, and on the 11th day of August, 1870, the said sheriff, by his official deed, conveyed the said real estate, so sold by him, to the appellant, who took possession thereof at the date of his said deed, and still held possession, claiming title thereto under and by virtue of his said deed, and by no other right or title; that the execution upon which said pretended sale was made was issued upon a judgment rendered by the court below, in a cause wherein Dudley Doyle and Matilda Armstrong were plaintiffs, and Nancy J. and Abel Griffith were defendants, on the 14th day of August, 1868, which judgment was predicated only upon a pretended assessment of benefits to said real estate, by reason of a ditch contemplated or constructed through said land; that said sheriff's sale was illegal and void; that it was made, and the said real estate sold, without having been appraised according to law; that said Nancy J. Griffith had no notice of the pendency of the suit in which the judgment was rendered, under which said real estate was sold; that no legal assessment of benefits was ever made, creating a lien on said real estate; that the assessment, pretended to have been made on the application of said Doyle and Armstrong, was made without any authority of law;

that there never was any legal lien for an assessment against said real estate; that, at the time of the making of said pretended assessment, the said Nancy J. Griffith was a minor under the age of twenty-one years; that, at the time of the commencement of the suit which culminated in said judgment, the said Nancy J. Griffith was a minor and the wife of said William L. Bird, and a non-resident of the State of Indiana; that, when the sheriff sold said real estate, and made a deed thereof to the appellant, the said Nancy J. was a non-resident of this State, and never had any notice of the assessment of benefits pretended to have been made to said real estate, nor of the meeting of the appraisers to make the same, nor of any of the proceedings which terminated in said sale and conveyance by the sheriff. Wherefore the appellees asked that said sheriff's sale and conveyance be adjudged illegal and void, etc.

The appellant moved the court to strike out a certain part of said complaint, which motion was overruled, and the appellant excepted; and his demurrer to said complaint, for the want of sufficient facts therein to constitute a cause of action, was also overruled, and his exception entered to this decision. He then answered the appellees' complaint, by a general denial thereof.

The issues joined were tried by the court without a jury, and a finding was made for the appellees, as prayed for in their complaint. The appellant's motion for a new trial was overruled, and to this decision he excepted, and judgment was rendered by the court, upon and in accordance with its finding.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In overruling his motion to strike out part of the complaint;
2. In overruling his demurrer to the complaint; and,
3. In overruling his motion for a new trial.

Cox v. Bird *et al.*

We will consider and decide the several questions presented by these alleged errors, in the order of their assignment.

1. The appellant moved the court to strike out a part of the appellees' complaint, upon the ground, as stated in the motion, "that the same is redundant, irrelevant, and does not state any fact tending to constitute a cause of action."

It is well settled, that this court will not reverse a judgment for error assigned in overruling a motion to strike out part of a pleading, even if the decision is palpably erroneous. Redundant or irrelevant matter in a pleading can not benefit the party for whom it is pleaded, nor can it work any possible injury to the opposite party. For this reason, even if the court may have erred in overruling a motion to strike out such matter, yet the error is not available for any purpose, and, therefore, we do not consider it. *Moore v. The State, ex rel.*, 55 Ind. 360; *The City of Crawfordsville v. Brundage*, 57 Ind. 262; *Hay v. The State, ex rel.*, 58 Ind. 337.

2. In discussing the alleged error of the court in overruling the appellant's demurrer to the complaint, the only point made by his counsel in this court is, that Dudley Doyle and Matilda Armstrong were necessary parties to the action. The point thus made is not presented by the appellant's demurrer to the complaint; for the only ground of objection to the complaint, stated in his demurrer, was the alleged insufficiency of the facts therein to constitute a cause of action. A defect of parties, either plaintiff or defendant, where the point of the objection is that it appears upon the face of the complaint that an additional party should be made, can only be presented by assigning such defects as the cause of demurrer. The objection of appellant's counsel, in argument, to the complaint is, that there are too few parties defendants to the action; and, in such case, the rule is, that "the demurrer must be upon

the ground of a defect of parties, and must specifically point out and name those who should have been, but were not, made parties." Buskirk Practice, p. 168. *Durham v. Bischof*, 47 Ind. 211, and cases cited.

The court did not err, we think, in overruling the demurrer to the complaint, upon the ground relied upon in this court.

3. It is earnestly insisted, by the appellant's counsel, that the finding of the court was not sustained by sufficient evidence, and that, for this reason, the court erred in overruling his motion for a new trial. This point, it seems to us, is well taken. The appellees' title to the real estate in controversy is and was entirely dependent upon the title of Nancy J. Griffith, afterward Nancy J. Bird, deceased, whose heirs at law they claim to be and were. If said Nancy J. had no title to said real estate, the appellees had none; and if the appellees did not own the property in question, they could not maintain this action. They offered evidence, which tended to prove that said Nancy J. might have been, but not that she was, the owner of said real estate, as the devisee of her father, William Griffith, deceased. This evidence consisted of the last will and testament of said William Griffith, deceased, and the probate thereof. In the first item of said last will and testament, the said testator gave and devised to his daughter, the said Nancy J., the said real estate, described in appellees' complaint, "when she shall become of lawful age;" and it was then provided, that "if, however, she should die before she arrives of lawful age of twenty-one years, then, in that case, the above property * * * shall descend or fall to my beloved brother, Abel Griffith." It will be seen from the terms of the devise to said Nancy J., that her title to said real estate was made to depend upon her arrival at the age of twenty-one years, and that, if she died before her arrival

The State v. Elder.

at that age, her heirs at law did not and could not acquire any title to, or interest in, said real estate. It seems to us, from our reading of the evidence, that it fails to show that said Nancy J. had arrived at the age of twenty-one years before her death, and therefore it failed to show that the appellees had, or could have, as the heirs at law of said Nancy J., or otherwise, any interest whatever in the subject-matter of this action.

In our opinion, the court below erred in overruling the appellant's motion for a new trial.

The judgment is reversed, at the appellees' costs, and the cause is remanded for a new trial.

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THE STATE v. ELDER.

CRIMINAL LAW.—Former Acquittal.—Murder of Unborn Child.—Attempt to Produce Miscarriage.—An acquittal, on an indictment charging the defendant with the murder of an unborn child by the use of means intended to produce a miscarriage by the mother, is no bar to an indictment for an attempt to produce such miscarriage by the use of the same or any other means.

From the Franklin Circuit Court.

T. W. Woollen, Attorney General, *B. Burke*, Prosecuting Attorney, and *D. W. McKee*, for the State.

BIDDLE, J.—The appellee was indicted for an attempt to produce a miscarriage on the body of Elizabeth Bradburn.

The indictment contains three counts.

The first count charges, that "One Anthony Elder, on the 8th day of June, 1876, at said county and State aforesaid, unlawfully and wilfully employed a certain instrument, known as a uterine sound, in and upon the person of one Elizabeth Bradburn, who was then and there a

The State v. Elder.

pregnant woman, by then and there inserting said instrument into the uterus of said Elizabeth Bradburn, and then and there and thereby attempting to rupture the placenta, with the intent then and there and thereby to produce the miscarriage of said Elizabeth Bradburn, the procuring of said miscarriage not being then and there necessary to preserve the life of the said Elizabeth Bradburn."

The second count of the indictment is the same as the first, except that it charges the appellant with having done the acts "by the hand of one Jane Abbott."

The third count in the indictment charges, that the appellant, on, etc., at, etc., "did then and there unlawfully and wilfully administer to one Elizabeth Bradburn, who was then and there a pregnant woman, a large quantity of medicine, with intent then and there and thereby unlawfully to produce the miscarriage of the said Elizabeth Bradburn, the procuring of said miscarriage not being then and there necessary to preserve the life of the said Elizabeth Bradburn, contrary," etc.

The appellant pleaded to the indictment by a special answer of former acquittal. The answer is so redundant in its averments, and thereby made so long, that it is quite impracticable to set it out in this opinion; nor need we do so, as the only objection taken to it is, that the offence set up therein, of which it is alleged the appellant was acquitted, was not the same offence as that charged against him in the present indictment. The charge against the appellant, in the first count of the indictment in the former case, which is set out in the answer, was for murder in the first degree, averred in the following words:

"That the said Anthony Elder, on," etc., "at," etc., "did then and there unlawfully and feloniously, purposely and with premeditated malice, kill and murder a certain child, unnamed, of one Elizabeth Bradburn, by then and there unlawfully and feloniously and purposely employing a

The State v. Elder.

v. *George*, 53 Ind. 434; *Wilkinson v. The State*, 59 Ind. 416; *The Commonwealth v. Kinney*, 2 Virginia Cases, 139; *The King v. Emden*, 9 East, 437; *Commonwealth v. Squire*, 1 Met. 258; *The State v. Lewis*, 2 Hawks, 98; *Price v. The State*, 19 Ohio, 423; *State v. Stanly*, 4 Jones, N. C. 290; *State v. Birmingham*, Busbee, 120; *The State v. Cooper*, 1 Green, N.J. 361; *The People v. Van Kcurin*, 5 Parker C. C. 66; *Roberts v. The State*, 14 Ga. 8; *The State v. Keogh*, 13 La. An. 243; *The State v. Townsend*, 2 Harring. Del. 543; *Commonwealth v. Cunningham*, 13 Mass. 245; *The State v. Benham*, 7 Conn. 414; *Holt v. The State*, 38 Ga. 187; *Commonwealth v. Tenney*, 97 Mass. 50; *Hite v. The State*, 9 Yerg. 357; *The State v. Reed*, 12 Md. 263; *Wilson v. The State*, 24 Conn. 57; *Durham v. The People*, 4 Scam. 172; *The King v. Vandercomb*, 2 Leach, 708, cited in 1 Leading Criminal Cases, 516; *The State v. Shepherd*, 7 Conn. 54; *The State v. Chaffin*, 2 Swan, 493; *Gillespie v. The State*, 9 Ind. 380.

The answer we are considering falls under the third rule above stated. The lesser offence, namely, the charge in the present indictment, was not involved in the greater, namely, that charged in the former indictment, upon which the appellant was acquitted, as alleged in his answer. An indictment for the murder of the unnamed child of Elizabeth Bradburn is by no means the same as an indictment charging the employment of certain means, with the intent to procure the miscarriage of Elizabeth Bradburn, although the same means were used to commit the offence in both cases. The lesser offence is not involved in the greater; the offences are not committed against the same person, and bear no resemblance to each other, either in fact or intent; the facts necessary to support a conviction on the present indictment would not necessarily have convicted, nor would they even have tended to convict, upon the former indictment. We can not adopt the rule held in some

The State v. Elder.

States, that the accused can not, in any case, be convicted but once upon the same facts when they constitute different offences, wherein the lesser offence is not involved in the greater, and when the facts charged in the second prosecution would not convict upon the former. We think the third rule, announced above, in such cases, expresses the law.

The answer is technically defective for another reason. It is pleaded to the whole indictment, and, to be sufficient, must be a bar to the whole indictment. The third count of the indictment charges, that the means used, with the intent to procure a miscarriage, was the administration "of a large quantity of medicine." The evidence necessary to convict upon this count would not have been admissible under the former indictment; much less would it have been sufficient to convict of the offence therein contained.

We believe this view is in accordance with the true construction of the following section of the code, 2 R. S. 1876, p. 402:

"SEC. 110. When the defendant has been convicted or acquitted upon an indictment for an offence consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offence charged in the former, or for any lower degree of that offence, or for an offence necessarily included therein." Moore Crim. Law, sec. 275.

The answer is insufficient. The court erred in holding it good.

The judgment is reversed, and the cause remanded, with directions to sustain the demurrer to the answer, and for further proceedings.

McCabe v. Goodwine.

McCABE v. GOODWINE.

CONTRACT FOR BENEFIT OF ANOTHER.—*Levy of Execution before Commencement of Bankruptcy Proceedings.—Release of Levy.—Satisfaction of Judgment.—Assignee's Sale and Conveyance Subject to Encumbrances.—Indemnity Bond.*—In an action by a judgment creditor, against the purchaser of real estate formerly belonging to E., one of the judgment debtors, and subject to the lien of the judgment, to enforce an alleged contract by the purchaser to pay such judgment, the court found specially as follows, viz.: that, at a time when D. and E., such debtors, were in fact insolvent, a third person, after service of process on the debtors, and then the plaintiff, on the appearance of the debtors without process, severally recovered judgments against the debtors, having priority of lien upon such real estate in the order named; that such judgments were recovered *bona fide*, and without knowledge by either the creditors or the debtors of the insolvency of the latter; that executions upon such judgments were levied by the sheriff on sufficient other property belonging to the debtors to satisfy both writs; that upon a petition subsequently filed the debtors were adjudged involuntary bankrupts, and the property levied upon was taken possession of and sold by the assignee in bankruptcy, the prior judgment lien satisfied from the proceeds of such sale, and the residue covered into the general fund without satisfying any part of the plaintiff's judgment; that subsequently the assignee sold, and, upon his petition setting out the terms of such sale, the bankrupt court ordered him to convey, to the defendant, the land in controversy, for a certain sum, subject to "all taxes, liens and encumbrances, on and against said land," as part of the purchase consideration, which the defendant, by his bond, "assumed the payment of" and agreed to indemnify the bankrupt estates against; and that there were, at that time, certain taxes and a mortgage for purchase-money due upon the land and having priority over the plaintiff's judgment.

Held, as a conclusion of law, that the levy of plaintiff's execution was valid against the assignee, that the officer holding it should not have delivered possession to the assignee, that the levy operated as a satisfaction of the plaintiff's judgment, that such judgment was not a lien upon the land when it was purchased by the defendant, and that the plaintiff can not recover.

From the Warren Circuit Court.

J. McCabe, for appellant.

J. W. Sutton, R. C. Gregory and W. B. Gregory, for appellee.

WORDEN, C. J.—Complaint by the appellant, against the appellee, in two paragraphs.

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McCabe v. Goodwine.

The first alleged, in substance, that in November, 1873, the plaintiff recovered a judgment in the Warren Circuit Court, against Daniel and Edward Bowlus, for the sum of three thousand and fifty-four dollars and some cents, which remains unpaid; that, at the time of the recovery of the judgment, Edward Bowlus was the owner of certain land described, situate in Warren county, upon which the judgment became a lien; that afterward both Daniel and Edward Bowlus were adjudged bankrupts, in the District Court of the United States for the District of Indiana, and that Joseph Poole was appointed their assignee, and the title to their property became vested in the assignee; that in May, 1874, on the petition of the assignee, the District Court ordered him to sell the land mentioned to the defendant, James Goodwine, on the terms already theretofore agreed upon, set forth in the petition, viz., for the sum of eleven hundred dollars cash, to be paid to the assignee by Goodwine, and Goodwine to assume and pay, as part of the purchase-money for the land, all liens and encumbrances that might attach to the land, and relieve the estate of the bankrupts from all liability therefrom; and it was ordered that the assignee take a bond from Goodwine to save and hold the bankrupts' estates free from any and all liability on account of liens and encumbrances on the land, and that, upon the payment to him of the money mentioned, he make a conveyance of the land to the purchaser, Goodwine; that Goodwine paid the money, and the conveyance was made to him in pursuance of the order of the court; that Goodwine executed a bond containing the following stipulation: "Now, as a part of the consideration for said land, the undersigned hereby assumes the payment of all taxes, liens and encumbrances on and against said land, and hereby covenants and agrees and binds himself to indemnify and save harmless the estates of said bankrupts from any and all liability, on ac-

VOL. LXV.—19

McCabe v. Goodwine.

count of any and all liens and encumbrances or debts, on or on account of said land ;" that the proceedings in bankruptcy were fully completed and ended before the commencement of this suit; that, prior to the commencement of this suit, the plaintiff accepted the terms of the agreement of said Goodwine, in the purchase of said land, and especially his aforesaid agreement to pay the liens and encumbrances on the same, and fully accepted the beneficial provisions of all of the defendant's obligation and undertaking, as set forth in the order of the District Court and the bond above referred to; that, before the commencement of this suit, the plaintiff notified the defendant that he had made such acceptance, and demanded the payment of his said judgment, which the defendant refused and still refuses to pay. Judgment is demanded for five thousand dollars and costs.

The second paragraph was much like the first in its general averments, and adds that before the purchase of the land of Poole by Goodwine, the latter took an assignment, in writing, to himself from William Ferguson, of certain notes and a mortgage executed by Edward Bowlus, on the land, to secure the payment of the notes, amounting to \$9,000 and interest. The mortgage bears date October 31st, 1872, and was duly recorded. That Goodwine, in violation of his obligation and undertaking above set forth, is claiming said mortgage to be a subsisting lien upon the land prior to the plaintiff's judgment. Prayer, that the mortgage be adjudged merged, extinguished and satisfied. so far as the plaintiff is concerned, by virtue of the defendant's purchase and agreement above set up, and that the land be declared subject to sale to satisfy the plaintiff's judgment, freed from any prior encumbrance on account of the mortgage.

In making up the issues, demurrers were overruled to several paragraphs of the defendant's answer, to which

rulings the plaintiff excepted. But, as no question is made in the brief of counsel for the appellant in respect to these rulings, we need not make any further statement of the pleadings in the cause. We have set out the substance of the complaint in order to a ready understanding of the facts found by the court.

The cause was submitted to the court for trial, who, at the request of the parties, found the facts specially, and stated his conclusions of law thereon, as follows :

" 1. That, on the 21st day of November, 1873, the plaintiff recovered in this court a judgment against Edward and Daniel Bowlus for \$3,054, and \$31⁸⁵/₁₀₀ costs, collectible without relief from appraisement laws, and bearing interest at the rate of ten per cent. per annum.

" 2. That, on the 21st day of November, 1873, Edward Bowlus held the legal title of the north half of section three (3), township (22) north, range 9 west, in Warren county, Indiana.

" 3. That, in December, 1873, an involuntary petition in bankruptcy was filed against Daniel and Edward Bowlus, in the United States District Court for the district of Indiana, upon which the said Daniel and Edward Bowlus were duly adjudged bankrupts, and Joseph Poole was, in due course of proceeding, appointed the assignee in bankruptcy of the said bankrupts.

" 4. That all the proceedings under said petition in bankruptcy were fully and entirely at an end before the present suit of the plaintiff was commenced.

5. "That Daniel and Edward Bowlus were farmers, engaged in the business of farming ; that they were insolvent when plaintiff's judgment was obtained, and that said judgment was obtained without process, upon a voluntary appearance and submission of the cause to the court for trial.

" 6. That, when plaintiff obtained his judgment, he did not know that the said Daniel and Edward were insolvent,

McCabe v. Goodwine.

and the judgment was not procured by the defendants thereto, for the purpose of preferring plaintiff to their other creditors; that the said Daniel and Edward did not then know or believe themselves to be insolvent.

"7. That, on the 18th day of May, 1874, the said assignee in bankruptcy filed his petition in the bankrupt court, as alleged in the complaint, and that said petition and the proceedings thereon were as set forth in 'Exhibit A,' filed with plaintiff's complaint herein; that afterward, on the 15th day of June, 1874, the assignee sold to the defendant herein, upon the terms theretofore agreed upon between them, and according to the direction of said court, the lands hereinbefore described; that this sale was made upon the terms set forth and contained in the said petition and the order of the court made thereon.

"8. That, on the 15th day of June, 1874, the defendant herein executed and delivered to the said assignee the bond, a copy of which is filed with the plaintiff's complaint as 'Exhibit B,' and, at the same time, paid to the said assignee, \$1,100, and received from him a deed for the said lands, containing a recital that the 'consideration for the conveyance was \$1,100, and the payment' by the grantee 'of all liabilities, liens and incumbrances now existing against said lands,' which deed, together with a copy of the said proceedings in the bankrupt court, the defendant herein caused to be recorded in the office of the recorder of Warren county, on the 18th day of September, 1874, and defendant now occupies said lands under said deed.

"9. That, before the bringing of this suit, the plaintiff notified the defendant that he accepted the 'beneficial provisions' of the contract between the defendant and the assignee, and demanded from the defendant payment of his judgment, which payment the defendant refused to make.

"10. That, on the 31st day of October, 1872, Edward

Bowlus purchased the lands hereinbefore described, from William Ferguson, and on that day executed and delivered to Ferguson the mortgage mentioned in the said petition of the assignee in bankruptcy, to secure the payment of the purchase-money due from Bowlus to Ferguson for the land.

" 11. That, at the time of the filing of said petition by said assignee, there were \$7,000 principal of said purchase-money unpaid and secured by said mortgage, which sum bore interest at the rate of ten per cent. per annum, making then due, of principal and interest, about \$7,800; that this sum of \$7,000 and accrued interest was unpaid on the 15th day of June, 1874, and that on that date there was also a lien on said lands for State and county taxes in the sum of \$100; that said lands were of the value of \$9,000.

" 12. That said mortgage was recorded in the office of the recorder of Warren county, on the 31st day of October, 1872, and was assigned in writing, together with the notes secured thereby, to the defendant herein, on the 28th day of February, 1874.

" 13. That, at the November term of this court for the year of 1873, Jacob Hanes recovered a judgment therein against Daniel and Edward Bowlus for \$1,768.58; that an execution thereon was duly issued on the 18th day of November, 1873, and placed in the hands of the sheriff of said county, at 11 o'clock A. M. of said day.

" 14. That, on the 21st day of November, 1873, the plaintiff herein caused to be duly issued, from the office of the clerk of said county, an execution on his judgment for \$3,054 and costs, which was placed in the hands of the sheriff of said county at 11 o'clock A. M. of said day.

" 15. That, on the 21st day of November, 1873, the said sheriff of Warren county, Indiana, duly levied said executions upon sufficient property belonging to said Daniel

McCabe v. Goodwine.

and Edward Bowlus, subject to execution in said county, to pay and satisfy the said judgments recovered by Hanes and by the plaintiff, and to pay and satisfy the executions thereon then in the hands of said sheriff.

"16. That, after the said property had been levied upon by the sheriff, but before it had been sold by him, the proceedings in bankruptcy were begun against the said Daniel and Edward Bowlus and the assignee appointed, and that the assignee in bankruptcy took possession of all the property of said Daniel and Edward, including the property in the custody of the sheriff under the levy made upon the Hanes and McCabe executions.

"17. That afterward the property levied upon by the sheriff was sold by the assignee in bankruptcy, and a portion of the fund arising therefrom applied to the full payment of the Hanes judgment, the residue of such funds continuing and remaining in the hands of the assignee until the final distribution of the assets of the estates of the bankrupts, and that no part thereof was applied to the payment, in whole or in part, of the plaintiff's judgment.

"And the court finds, as conclusions of law, from the foregoing facts:

"1. That the plaintiff's judgment was, at the time of the commencement of the proceedings in bankruptcy, a valid judgment, obtained *bona fide*, and not in violation of the bankrupt laws of the United States, and became a lien upon the lands described in the complaint at the date of its rendition. *Little, Assignee, v. Alexander*, 21 Wallace, 500.

"2. That the bond given by the defendant to the assignee is a valid obligation, and that, by its terms, the defendant is liable for the payment of all the liens upon the land purchased by him from the assignee, that were subsisting and unsatisfied at the date of his purchase. *Hardy v. Blazer*, 29 Ind. 226.

"3. That the levy made by the sheriff, under the execution issued upon the plaintiff's judgment on the property of Daniel and Edward Bowlus, gave the plaintiff a valid lien thereon, superior to the claim of the assignee in bankruptcy. Bump Bankr., 8th ed., 164; Herman Ex. 279; *In re Campbell*, 7 Am. L. Reg. n. s. 100; *In re Schnepf*, 7 Am. L. Reg. n. s. 204; *Marshall v. Knox*, 12 Am. L. Reg. n. s. 630; 2 Bankr. Reg. 124; *Sharman v. Howell*, 40 Ga. 257; S. C., 2 Am. Rep. 576; *Parks v. Sheldon*, 36 Conn. 466; *O'Harra v. Stone*, 48 Ind. 417.

"4. That the lien of that levy continued after the property came into the possession of the assignee in bankruptcy. 7 Am. Law Reg. n. s. 100, 204, *supra*; *In re Hughes*, 11 Nat. Bankr. Reg. 452; Bump Bankr. 164.

"5. That the levy was a satisfaction, *prima facie*, of the plaintiff's judgment, and the *onus* is cast upon the plaintiff of showing, before he can take other proceedings upon his judgment, that, from no fault of his, the levy has not proved productive of a complete satisfaction. Freeman Ex., secs. 269, 271; *Lyon v. Hampton*, 20 Pa. State, 46; *Hunt v. Breeding*, 12 S. & R. 37; *Ford v. Geauga County*, 7 Ohio, 492; *Lindley v. Kelley*, 42 Ind. 294.

"6. That, when the defendant purchased the lands described in the complaint, the plaintiff's judgment was satisfied *sub modo*, and he could not then have maintained an action upon it, and can not now do so, without showing that the levy was legally disposed of without producing an absolute satisfaction; that the levy could not be abandoned to the injury of the defendant. Freeman Ex., sec. 271; *M'Intosh v. Chew*, 1 Blackf. 289; *Stewart v. Nunemaker*, 2 Ind. 47; *Lindley v. Kelley*, 42 Ind. 294, 307.

"7. That no reason is shown why the levy was not productive of an absolute satisfaction of the plaintiff's judgment.

"8. That it was the duty of the plaintiff to diligently pursue and protect his levy. *Frank v. Brasket*, 44 Ind. 92; *Stewart v. Nunemaker*, 2 Ind. 47; Freeman Ex., sec. 269.

McCabe v. Goodwine.

"9. That, upon the foregoing facts, the plaintiff is not entitled to recover a judgment against the defendant.

"The court therefore finds for the defendant."

Exception was duly taken by the plaintiff to the conclusions of law stated, and judgment was rendered for the defendant.

Errors are assigned upon the conclusions of law, which bring them in review here.

Goodwine, by his purchase, took the land subject, doubtless, to all the liens thereon, and those liens might be enforced against the land in the modes prescribed by law.

The levy of the execution upon the property of the Bowluses was made before the proceedings in bankruptcy were had, and, of course, before the execution by the defendant of the bond mentioned; and if the levy, under the facts found, operated as a satisfaction of the plaintiff's judgment, then the bond given by Goodwine, admitting it to have been valid and binding upon him personally for the absolute payment of all liens upon the land, a point which we need not decide, it did not bind him for the payment of the plaintiff's judgment, which was not a lien upon the land, because it had been satisfied.

We think it clear that the levy, it having been made upon sufficient property to satisfy the judgment, must be regarded, under the facts found, as a complete satisfaction.

A levy upon property sufficient to satisfy an execution operates, *prima facie*, as a payment of the judgment on which it issues, and will be a complete satisfaction, unless, without fault of the plaintiff therein, it has failed to be productive of complete satisfaction.

Whatever might be the effect of such levy, as between the parties, where the property has been released therefrom by their consent, the plaintiff can not abandon such

levy, to the injury of third persons. See the authorities cited in the opinion of the court below. We will notice some of them more in detail :

In the case of *M'Intosh v. Chew*, 1 Blackf. 289, the court said, among other things :

" Viewing the subject, then, on the principles of strict law or of a liberal construction, or on considerations of natural reason and convenience, we are of opinion that goods or lands taken in execution, must be considered as a satisfaction of the judgment debt, and may be pleaded in bar of any other action against the same defendant for the same demand, until their insufficiency is made manifest by a sale and return, showing the amount made of the property so levied ; and then they are an absolute satisfaction *pro tanto*, and the plaintiff may proceed for what remains."

The case of *Lindley v. Kelley*, 42 Ind. 294, is to the same effect, and contains a reference to most, if not all, of the previous decisions of this court upon this point.

In the case last cited, the following quotation is made from the opinion of the Supreme Court of the United States, in the case of *United States v. Dashiell*, 3 Wal. 688 :

" Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, it is doubtless true, that if the marshal or sheriff wastes the goods, or they are lost or destroyed by the negligence or fault of the officer, or if he misapplies the proceeds of the sale, or retains the goods and does not return the execution, the debtor is discharged ; but if the levy is overreached by a prior lien, or is abandoned at the request of the debtor or for his benefit, or is defeated by his misconduct, the levy is not a satisfaction of the judgment. Rightly understood, the presumption is only *a prima facie* one in any case, and the whole extent of the rule is that the judgment is satisfied when the execution has been so used as to change the title of the goods, or in some way to

McCabe v. Goodwine.

deprive the debtor of his property. When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt, says BRONSON, C. J., is gone, although the creditor may not have been paid. Under these circumstances the creditor must take his remedy against the officer, and if there be no such remedy he must bear the loss."

What was thus said, was said in a case where the question arose between the plaintiff and the defendant in the execution, there being no rights of third persons involved.

In *Hunt v. Breeding*, 12 S. & R. 37, it was held, that a judgment creditor, who has taken in execution the goods of his debtor, can not afterward discharge them from the execution, and continue his judgment in force as to the land of the debtor. GIBSON, J., in delivering the opinion of the court, said, among other things:

"The sum of the matter, therefore, appears to be this: Where the goods are actually seized, the property vests in the sheriff, and the debt becomes satisfied, as to the judgment creditor, who can look only to the sheriff, unless where the latter chooses to return *nulla bona*, and there he becomes answerable to the judgment creditor for his false return, who may also levy the same goods on another execution. Here the sheriff returned, that he had levied and left the goods in the possession of the debtor, and the judgment must therefore be treated as having been at one time actually satisfied. Whether it might not be restored to its former incidents, by the agreement of the parties, as between themselves, is not the question; assuredly it could not be restored so as to deprive third persons of an advantage which they had gained, by its having at any period been discharged; consequently, its lien on this land is gone."

The same doctrine was reaffirmed in the case of *Lyon v.*

Hampton, 20 Pa. State, 46, where it was held, that "The seizure of goods in execution to the amount of the debt is a discharge of the judgment whether the goods be sold or not, so far as the rights of other creditors are concerned, except where the plaintiff is deprived of the fruit of his levy, without any fault of his own."

In the case of *Ford v. Geauga County*, 7 Ohio, 492, it was held, that "When an execution is levied upon chattels sufficient to pay the debt, and subsequently the goods are restored to the defendant by consent of the plaintiff, the judgment lien on the defendant's land is lost as against a purchaser during the continuance of the levy."

It seems to us to have been clearly the fault of the plaintiff that the proceeds of the property levied upon were not applied to the payment of his judgment. The bankruptcy of the Bowluses did not in any manner deprive him of the lien which he had acquired upon the property by his levy, and he was entitled to have the proceeds applied to his judgment. By taking the proper steps he might have secured such application. This the authorities cited by the court below abundantly establish. It is said in *Bump Bankruptcy*, 8th ed., p. 164, in speaking of liens:

"The first point to be ascertained is, whether there is a valid lien according to the laws of the State where the property is situated. * * * If there is a valid lien under those laws, it follows the property into the court of bankruptcy, and will be there recognized, protected, and enforced."

We make the following extract from *Herman Executions*, p. 279:

"The lien of a levy made under an execution issued upon final judgment, obtained *bona fide* and without collusion, is preserved by the bankrupt law. It does not discourage diligence in the collection of debts. Creditors

McCabe v. Goodwine.

who have obtained a lien by a legitimate effort to collect an honest debt are permitted to enjoy the advantage gained by their diligence. A levy that is good and creates a valid lien under the State laws is valid even in a bankrupt court. The law does not divest liens acquired and consummated before the adjudication in bankruptcy, but protects all valid judgments to the same extent as the constitution of the United States guards the obligation of contracts when attempted to be impaired by State laws, and is an affirmation of the universal principle, that 'a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds.' Courts in bankruptcy give effect to liens, according to priority."

It seems to us to have been clearly the fault of the plaintiff that the proceeds of the sale of the property levied upon were not applied to the payment of the judgment. The subsequent bankruptcy of the judgment defendants did not, as has already been said, deprive him of the lien which he had acquired by his levy, and he might have taken the proper steps to have the proceeds applied, as far as necessary, upon his judgment.

We believe it was the practice, to some extent, during the early period of the existence of the bankrupt law, for assignees to take possession of property levied upon by sheriffs before proceedings in bankruptcy were commenced, and not sold, and sell the same as assets of the bankrupt; the court of bankruptcy, upon a proper application, preserving the lien of the levy by making proper application of the proceeds of the sale. Even under this practice, it was clearly the duty of the plaintiff to have made application to the court of bankruptcy, for the proper application of the proceeds of the sale of the property levied upon.

The case, under the practice above noticed, is, in principle, much like that of *Frank v. Brasket*, 44 Ind. 92. There, a judgment had been recovered, upon which replevin

McCabe v. Goodwine.

bail had been entered. An execution, issued upon the judgment, had been levied upon sufficient real property of the principal to pay the debt. A third person commenced an action, to which the judgment plaintiffs were parties, asserting an unfounded prior lien upon the property levied upon, and, through the fault of the execution plaintiffs, judgment was rendered establishing the alleged prior lien. The execution plaintiffs could have made such proofs, but did not, as would have defeated the supposed prior lien. They then levied upon the property of the replevin bail. This, it was held, could not be done. The court said: "It is settled that a levy upon property, real or personal, sufficient to pay the execution, operates as a satisfaction until such levy is legally disposed of by the sale of the property, or in some other legal manner. *Lindley v. Kelley*, 42 Ind. 294, and cases cited. According to the finding in this case, the levy upon the land of the principal debtors was available to satisfy the judgment, had the execution plaintiffs made use of reasonable diligence in protecting and following it up. It was only in consequence of their negligence in not making a proper defence against the pretended superior lien which was asserted, that the levy was rendered unproductive. Had they made a proper defence in that action, the court finds, they might have defeated the asserted lien and made the amount of their debt out of the property on which their execution had been levied. We think it is the duty of an execution plaintiff under such circumstances to make use of reasonable and ordinary diligence to protect his levy and make it available."

But, aside from the foregoing view of the case, there is another which is conclusive of the question. The assignee had no right to take the property from the sheriff, nor the sheriff to deliver it to him, unless it was done under some legal process, which does not appear. This has been settled by the Supreme Court of the United States. In the

Sturgeon *et al.* v. The Board of Commissioners of Daviess County.

case of *Marshall v. Knox*, 16 Wal. 551, 559, the court said, in speaking of the case then before it: "Such a case is similar to that of an execution, in reference to which it has properly held that where the levy is made before the commencement of proceedings in bankruptcy, the possession of the officer can not be disturbed by the assignee. The latter, in such case, is only entitled to such residue as may remain in the sheriff's hands after the debt for which the execution issued has been satisfied."

The case is one, therefore, in which it was the duty of the sheriff to proceed to make the money of the property levied upon; instead of doing which, however, he surrendered it to another person without authority of law. Under such circumstances the levy very clearly operated as a satisfaction of the judgment; and it was not a lien upon the land purchased by Goodwine at the time of his purchase.

There is no error in the conclusions of law stated by the court below, of which the appellant can complain.

The appellee has assigned some cross errors which it will be unnecessary to consider, inasmuch as the judgment below in his favor will have to be affirmed.

The judgment below is affirmed, with costs.

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STURGEON ET AL. v. THE BOARD OF COMMISSIONERS OF DAVIESS COUNTY.

MORTGAGE.—*Complaint for Foreclosure.*—*Copy of Acknowledgment Unnecessary.*—*Recording Instrument.*—*Defence.*—In an action by the mortgagee, against the mortgagor and a subsequent purchaser, to foreclose a mortgage on real estate, the complaint alleged that the mortgage had been duly executed and recorded, setting out a copy thereof which did not show any certificate of acknowledgment.

Sturgeon et al. v. The Board of Commissioners of Daviess County.

Held, on demurrer, that the acknowledgment is no part of the cause of action, and a copy thereof is not necessary, and that the reasonable inference from the averments of the complaint is that the mortgage had been duly acknowledged.

Held, also, that the want of an acknowledgment should, in such case, be set up affirmatively as a defence.

SAME.—Illegal Loan by County Commissioners.—Ultra Vires.—In an action by a board of county commissioners, upon a promissory note, and to foreclose a mortgage on real estate given to secure the payment of the note, both executed to the plaintiff, the mortgagor answered, alleging that the consideration for the note was an illegal, unauthorized loan to him, by the plaintiff, of a sum of money belonging to the "court-house fund" of such county.

Held, on demurrer, that the answer is insufficient.

From the Daviess Circuit Court.

J. W. Burton, W. J. Mason and W. D. Bynum, for appellants.

NIBLACK, J.—The Board of County Commissioners of the county of Daviess brought this action against William A. Sturgeon and William J. Mason, to foreclose a mortgage.

The complaint stated, that, on the 21st day of November, 1871, the defendant Sturgeon, by his promissory note of that date, a copy of which was filed with the complaint, promised to pay the plaintiff, on or before the 10th day of April, 1873, the sum of five hundred dollars, without relief from valuation laws, and with nine per cent. interest, payable annually in advance, and also reasonable attorney's fees in case of suit on the note; that the said Sturgeon executed a mortgage on an eighty-acre tract of land in Daviess county, particularly describing it, to secure the payment of said promissory note, a copy of which mortgage was also filed with the complaint; that said mortgage was filed for record the day after its execution and was recorded in the proper record in the recorder's office of the said county of Daviess; that, since the execution of said mortgage, the said Sturgeon had sold and conveyed the land embraced within it to his codefendant Mason;

Sturgeon et al. v. The Board of Commissioners of Daviess County.

and that said note remained unpaid. Wherefore a foreclosure of the mortgage was demanded.

The copy of the mortgage filed with the complaint did not have anything attached to, endorsed upon or accompanying it, showing that the mortgage had been acknowledged before it was recorded.

The defendants demurred separately to the complaint, but their demurrers were severally overruled.

Mason then answered in general denial, and Sturgeon answered, admitting the execution of the note, but averring that the consideration for which the note and mortgage were executed was a pretended loan to him by said board of commissioners, out of a fund known as "the court-house fund," levied and collected by said board from the tax-payers of said county of Daviess, for the special purpose of erecting a new court-house in said county; also averring that said board of commissioners acted without any legal authority as a corporation, in making said pretended loan and in taking said note and mortgage. Wherefore he, the said Sturgeon, was not liable to pay said note to said board of commissioners, but was liable, if at all, to the tax-payers of said county.

The court sustained a demurrer to this separate answer of Sturgeon, and, he declining to answer further, the complaint was taken as confessed as against him. The cause being submitted to the court for trial, the court made a finding in favor of the plaintiff, for the amount of the note, with interest, including an attorney's fee, and decreed the foreclosure of the mortgage and a sale of the mortgaged premises to pay the amount thus found due.

The appellants contend, that the complaint was, at all events, insufficient as against Mason, because there was no averment in it, or memorandum or writing attached to, endorsed upon or connected with the copy of the mortgage, accompanying it, as above stated, showing that the mort-

Sturgeon et al. v. The Board of Commissioners of Daviess County.

gage was properly acknowledged before it was recorded, and no averment charging that Mason had actual notice of the existence of said mortgage, at the time of his purchase of the mortgaged premises.

It is true, as the appellants claim, that, if the mortgage was not properly acknowledged before it was placed on record, the record of it was not constructive notice to Mason of the mortgage when he afterward purchased the mortgaged premises. But we are of the opinion that the allegation that the mortgage was recorded in the proper office fairly carried with it the presumption that the mortgage was properly prepared for record before it was so recorded, and left it a matter to be set up in defence, if in fact the mortgage was not acknowledged before it was so placed upon record.

The filing of the copy of the mortgage with the complaint, without a certificate of acknowledgment attached to it, was a sufficient compliance with section 78 of the code requiring a written instrument constituting the foundation of the action, or a copy of it, to be filed with the complaint.

A certificate of acknowledgment attached to a mortgage forms no part of the mortgage itself, but is an instrument separate and distinct from the mortgage. *The State v. Dufour*, 63 Ind. 567.

We see no objection to the sufficiency of the complaint as against either of the appellants.

The appellants further contend, that the court erred in sustaining the demurrer to the separate answer of Sturgeon; that the boards of commissioners of the several counties are tribunals of inferior and limited jurisdiction, possessing only such powers as are conferred upon them by law; that, as such commissioners are not expressly authorized to loan the money belonging to their respective counties, a loan by them of any of the funds of their coun-

Sturgeon et al. v. The Board of Commissioners of Daviess County.

ties is necessarily a wrongful and unlawful act which could not constitute a valid consideration for the execution of a note and mortgage for the repayment of such loan; that the acceptance of such a note and mortgage by the commissioners is *ultra vires*; and that, hence, no action could be maintained by such commissioners upon a note and mortgage executed for the repayment of a loan thus unlawfully made by them.

It is unquestionably true that the boards of commissioners of the several counties are, as to the general administrative and judicial functions possessed by them, tribunals of inferior and limited jurisdiction, and only authorized to exercise such powers as are expressly or impliedly conferred upon them by statute; but they are, at the same time, corporations having all other duties, rights and powers incident to corporations, not inconsistent with the law of their creation and the various statutes prescribing their duties. *Haag v. The Board of Commissioners of Vanderburgh County*, 60 Ind. 511.

In Sedgwick on Statutory and Constitutional Law, p. 73, 2d edition, it is said:

“It must be further borne in mind, that the invalidity of contracts made in violation of statutes, is subject to the equitable exception, that, although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement can not be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains. And the principle of this exception has been extended to other cases. So, a person who has borrowed money of a savings institution upon his promissory note, secured by a

Sturgeon et al. v. The Board of Commissioners of Daviess County.

pledge of bank stock, is not entitled to an injunction to prevent the prosecution of the note, upon the ground that the savings bank was prohibited by its charter from making loans of that description."

The case of *The Steam Navigation Company v. Weed*, 17 Barb. 378, was one to recover money loaned. The defence was, that the corporation had no power to loan the money; and it was held that the defendant was not at liberty to avail himself of the defence. The court, in that case, drew a distinction between the violation of an express statute and the mere want of power to make the contract alleged to be unlawful; recognizing the law to be, in that respect, as above laid down by Sedgwick.

These authorities are well sustained by the cases to which they refer, and are, we think, fully applicable to, and decisive of, the question now before us.

It is to the corporate powers of the board of commissioners of the county of Daviess to which we have to give a construction in this case, rather than to their administrative or judicial powers. *The State Board of Agriculture v. The Citizens' Street Railway Co.*, 47 Ind. 407, and authorities there cited; *Halstead v. The Board of Comm'rs of Lake County*, 56 Ind. 363; *Baker v. The Board of Comm'rs, etc.*, 53 Ind. 497; *Driskill v. The Board of Comm'rs, etc.*, 53 Ind. 532.

We are very clearly of the opinion, that there was no error in the decision of the court upon the demurrer to Sturgeon's separate answer, as complained of by the appellants.

What we have said practically disposes of all the questions fairly raised upon the record.

The judgment is affirmed, at the appellants' costs.

Berlin v. Oglesbee et al.

BERLIN v. OGLESBEE ET AL.

PRACTICE.—Motion to Strike Out.—Record.—Bill of Exceptions.—A party complaining of a ruling sustaining a motion to strike out a part of a pleading must, if he would present any question thereon to the Supreme Court, not only except thereto at the time, but also make the motion, ruling and part struck out parts of the record by a bill of exceptions.

SAME.—Harmless Ruling on Demurrer.—Action to Recover Real Estate.—As all matters of defence to an action to recover possession of real estate are admissible in evidence under the general denial, the sustaining of a demurrer to a special paragraph of answer is harmless, if the general denial be also pleaded.

SAME.—New Trial.—Assignment of Error.—Change of Venue.—Instruction.—Error in refusing a change of venue, or an instruction asked, is cause for a new trial, and can not be presented to the Supreme Court, by an independent assignment of error.

SAME.—Bill of Exceptions.—The truth of causes alleged as grounds for a new trial must be made to appear to the Supreme Court by a bill of exceptions.

From the Marshall Circuit Court.

J. S. Bender and H. Corbin, for appellant.

W. B. Hess, for appellees.

Howk, J.—This was a suit by the appellees, against the appellant, to recover the possession of certain real estate, particularly described, in Marshall county, Indiana, with all the appurtenances thereon belonging, "including the steam saw-mill and all the fixtures and appurtenances thereto belonging," situate thereon, and damages for being kept out of the possession thereof. The complaint consisted of a single paragraph, and was in the usual statutory form in such cases.

The appellant answered in five paragraphs, and filed a cross complaint containing two paragraphs. The appellees moved the court, in writing, to strike out a certain part of the second paragraph of the cross complaint, which motion was sustained, and to this ruling the appellant excepted. The appellees demurred to each of the fourth and fifth

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paragraphs of the answer, for the want of sufficient facts therein to constitute a defence to their action; which demurrers were each sustained by the court, and the appellant excepted to these decisions. To the second and third paragraphs of the appellant's answer the appellees replied by a general denial; and they also answered, by a general denial, the first and second paragraphs of the appellant's cross complaint.

On the appellant's application, supported by affidavit, the venue of the action was changed to the Kosciusko Circuit Court, such change to be perfected within thirty days. This change of venue was not perfected by the appellant; and afterward, at the next term of the court below, the issues joined were tried by a jury, and a verdict was returned, that the appellees were the owners and entitled to the possession of the real estate described in their complaint, and had sustained damages by the detention thereof in the sum of one cent. Afterward, at the same term, the appellant, having paid all the costs in the case, was granted a new trial thereof, without cause shown, under the statute.

At the next term of the court the appellant again moved the court, upon his affidavit then filed, for a change of venue from Marshall county, which motion was overruled by the court, and to this ruling he excepted. By agreement, the cause was then tried by the court without a jury, and a finding was made for the appellees, as prayed for in their complaint, and assessing their damages in the sum of one cent. The appellant's motion for a new trial was overruled by the court, and he excepted to this decision, and judgment was then rendered by the court upon and in accordance with its finding, to which judgment the appellant excepted and appealed therefrom to this court.

The appellant has here assigned, as errors, the following decisions of the circuit court:

Berlin v. Oglesbee et al.

1. In sustaining the appellees' motion to strike out a certain part of the second paragraph of the appellant's cross complaint ;

2. In sustaining the appellees' demurrers to the fourth and fifth paragraphs of the appellant's answer ;

3. In overruling the appellant's motion for a change of venue ;

4. In requiring the appellant to try this case in Marshall county, after and over his application for a change of venue ;

5. Error of the court in giving a certain instruction ; and,

6. Error of the court in overruling his motion for a new trial.

We will consider and decide the questions arising under these alleged errors, in the order of their assignment.

1. The first error assigned by the appellant, the decision of the court striking out a certain part of the second paragraph of his cross complaint, was not properly saved in the record. The court having sustained the appellees' motion, and having struck out a part of the second paragraph of the cross complaint, it is very certain, we think, that the matter thus struck out could not be made again a part of the pleading, or of the record, except by a bill of exceptions. It has been settled by many decisions of this court, that, where a pleading, or part of a pleading, has been struck out on motion, the party complaining of such action, who may wish to present the question to this court, as an alleged error, must not only except at the time to the decision of the court, but he must make the pleading, or part of a pleading, so struck out, and the motion to strike out and the decision of the court thereon, parts of the record of the cause, in and by a proper bill of exceptions. *Thomas v. Passage*, 54 Ind. 106 ; *Broker v. Scobey*, 56 Ind. 588 ; *Scotten v. Divilbiss*, 60 Ind. 37 ; and *The School*

Town of Princeton v. Gebhart, 61 Ind. 187. In this case, therefore, the first alleged error was not so saved in the record as to present any question for our decision.

2. The appellant has assigned, as error, the decisions of the circuit court in sustaining the appellees' demurrers to the fourth and fifth paragraphs of his answer. In each of these paragraphs, the appellant stated special or affirmative matters, by way of defence to appellees' action. The first paragraph of the appellant's answer contained a denial of each and every material allegation in the complaint. Under such a denial, it is provided, in section 596 of the practice act, that "the defendant shall be permitted to give in evidence every defence to the action that he may have, either legal or equitable." 2 R. S. 1876, p. 252.

If it were conceded, that the court below erred in this case, in sustaining the appellees' demurrers to the fourth and fifth paragraphs of the appellant's answer, the error would have been harmless; for it is clear, that all the evidence, admissible under either of the said paragraphs, would have been, under and by force of the statutory provision above quoted, also admissible under the general denial in the first paragraph of the answer. *Strough v. Gear*, 48 Ind. 100; *Baker v. The Arctic Ditchers*, 54 Ind. 310; *Spath v. Hankins*, 55 Ind. 155. This court will not reverse a judgment for a harmless error.

3. The third and fourth errors assigned by the appellant relate to the same matter, and may be properly considered together. The overruling of a motion for a change of venue, if erroneous, is a cause for a new trial, under the first statutory cause for a new trial; for it is an irregularity in the proceedings of the court, by which a party is prevented from having a fair trial. 2 R. S. 1876, p. 179, sec. 352; *Horton v. Wilson*, 25 Ind. 316; *Dawson v. Coffman*, 28 Ind. 220; and *Wiley v. Barclay*, 58 Ind. 577.

As independent errors, therefore, the third and fourth

Berlin v. Oglesbee et al.

alleged errors were not well assigned ; for, a cause for a new trial, merely, can not be assigned as error in this court. *Freeze v. DePuy*, 57 Ind. 188, and *Walls v. The Anderson, etc., R. R. Co.*, 60 Ind. 56, and *Buskirk Practice*, p. 126, and cases cited.

5. The fifth error assigned by the appellant was the refusal of the circuit court to give a certain instruction, as requested by him. This alleged error, also, was merely a cause for a new trial ; and, when assigned in this court as an independent error, it presents no question for our decision. We need not cite any additional authorities in support of this ruling, beyond those referred to in our consideration of the third and fourth alleged errors.

6. The sixth and last error assigned in this court is the overruling of the appellant's motion for a new trial. Neither the evidence nor any ruling or decision of the court, on or before the trial of the cause, was made part of the record by any proper bill of exceptions. The causes for a new trial, assigned in the motion therefor, were therefore the naked statements of the appellant of certain alleged facts, the truth whereof ought to have been, but was not, established and supported by the record. In such case, where the record fails to show that the alleged causes for a new trial, or any of them, are true, we are bound to conclude, that the court did not err in overruling the appellant's motion for such new trial. For the decisions and rulings of the circuit court must and will be presumed to be right, until the contrary is shown by the record. *Myers v. Murphy*, 60 Ind. 282.

If the court erred in any manner, on the trial of this cause, to the prejudice of the appellant, the error has not been properly saved, and can not be made available in this court, for the reversal of the judgment.

The judgment is affirmed, at the appellant's costs.

Schoonover v. Reed.

SCHOONOVER v. REED.

PRACTICE.—Nunc Pro Tunc Entry of Time to File Bill of Exceptions.—Parol Evidence.—Parol evidence alone is not sufficient to authorize a *nunc pro tunc* entry, after the expiration of the term, showing that time was granted in term time for the filing of a bill of exceptions.

SAME.—Docket Entry.—To authorize such an entry there must have been a minute on some docket or order book, made at the term, showing that time was duly granted.

SAME.—Statement of Judge in Bill of Exceptions.—Record.—A statement by the judge, in a bill of exceptions signed by him and filed after the expiration of the term, that time for the filing thereof had been granted, is not sufficient to authorize such entry, and such bill of exceptions forms no part of the record.

From the Warren Circuit Court.

J. A. Stein, A. O. Behm, J. Park and G. O. Behm, for appellant.

J. McCabe, for appellee.

PERKINS, J.—Application, in the Warren Circuit Court, for a *nunc pro tunc* entry in the record of a cause. Application refused. Appeal to this court. The facts are as follows: The cause of *Schoonover v. Reed*, which is numbered 4,252 in this court, was tried in the Warren Circuit Court, Indiana, on the fifteenth day of the November term, 1873, and judgment entered. The record does not show that any time was given in which to file a bill of exceptions. Further along in the record this entry appears:

“And afterwards, to wit, on the 2d day of February, 1874, said defendant filed in the office of the clerk of said court his bill of exceptions herein, which reads,” etc.

The bill concludes as follows:

“Thereupon the plaintiff remitted two hundred dollars of the verdict, and then the court overruled the defendant’s motion for a new trial, to which action and decision of the court the defendant at the time excepted, and the court gave sixty days to file a bill of exceptions, prays an appeal to the Supreme Court, which is granted; and defendant

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Schoonover v. Reed.

now presents his bill of exceptions within the time allowed by the court and asks that the same be signed and made part of the record, which is done accordingly.

“THOS. J. DAVIDSON.”

This bill, it is admitted, was signed and filed after the expiration of the said November term of said court; but it is claimed that leave was given by the court at said term to file said bill within sixty days after the expiration of the term, and that the clerk omitted to enter the grant of leave upon the record. This was an application asking that the clerk be ordered by the court to make a *nunc pro tunc* entry of said grant of leave; and the question is, could the court make such order in this case, upon its particular facts? It was sought to be made upon parol evidence, there being no memoranda or memorandum upon any docket, or upon the order book, of said court, to aid or guide in making it. And the question is, could it be made upon such evidence alone? We have a series of decisions bearing upon the question, to which we turn our attention. In *M'Manus v. Richardson*, 8 Blackf. 100, it is said:

“The amendment proposed is, that the judgment be so altered as to be against M'Manus alone. We think the error in the entry of the judgment is shown by the proceedings previous to the judgment, to be a clerical one, and that it is therefore amendable.” *Fite v. Doe*, 1 Blackf. 127, and *King v. Anthony*, 2 Blackf. 181, are cited. Perhaps the above can not properly be called a *nunc pro tunc* entry, but simply an amendment of a clerical error in the record, by what appeared in another part of the record, and where no ruling of the court had been omitted to be entered by the clerk, but it is analogous. See *Hamilton v. Burch*, 28 Ind. 233. In *Wilson v. Vance*, 55 Ind. 394, it is said:

“The office of a *nunc pro tunc* entry is to make a record of what was previously done, but not then entered; not to make an order, now for then, but to enter, now for then, an order previously made.”

Nunc pro tunc entries may be necessary while the proceedings in the cause are *in fieri*, that is, before they have progressed to final judgment; or they may be required after final judgment has been rendered, and the term at which it was rendered has terminated. As to the former class, see 3 Bl. Com. 406. As to the latter class, they may be made upon evidence. In *Jenkins v. Long*, 23 Ind. 460, this is decided. We quote from the opinion in the case:

"2. Was any evidence admissible, upon the hearing of the motion" (for the *nunc pro tunc* entry), "outside of the judgment sought to be amended? This question can receive only an affirmative answer. It would be in vain to seek relief against a clerical error, unless such error may be shown to exist; and the instances would be rare indeed in which the error would be apparent upon the face of the record itself. It is barely possible to imagine cases in which an inspection of the whole record would show that a clerical error, like the one in this case, had been committed. No question is before us, in this instance, as to the kind of evidence which would be sufficient to justify an amendment after the proceedings have ceased to be *in fieri*, and we are, therefore, not called upon to discuss that subject."

See *Boyd v. Blaisdell*, 15 Ind. 78, and cases cited. In *Makepeace v. Lukens*, 27 Ind. 435, it is decided, in a very elaborate opinion, that such *nunc pro tunc* entries can not be made upon parol evidence alone; that they can only be made "where there is some memorial paper, or other minute of the transactions in the case," from which what occurred can be ascertained. In *Hamilton v. Burch*, 28 Ind. 233, the decision in *Makepeace v. Lukens* is approved.

In *Uland v. Carter*, 34 Ind. 344, the same doctrine is recognized as the law.

See *Hebel v. Scott*, 36 Ind. 226; *Latta v. Griffith*, 57 Ind. 329; *Buckner v. The State*, 56 Ind. 208, 210; *Long v. The State*, 56 Ind. 133.

Schoonover v. Reed.

In some courts in other States, such entries are allowed simply upon parol evidence. But, as it seems to be the settled law of this State that a *nunc pro tunc* entry of an order or judgment of a court can not be made upon such evidence alone, we think it the better course to adhere to the law as thus settled. One of these views of the law, being acted upon, may cause some rulings made by the court to be lost. The other may cause a greater number, that were never made, to be entered of record. When we look at the manner in which, under the statute, the proceedings of our courts are recorded and perpetuated, it would seem, in the absence of gross carelessness, that mistakes could hardly occur. The statute makes it the duty of the clerks of the several courts to "procure, at the expense of the county, all necessary judges', appearance, bar, judgment, and execution dockets, and final record books," etc.; and that officer is bound to make, keep and preserve the records of the proceedings of the courts. 2 R. S. 1876, p. 16, sec. 8.

The practice is, for the court to have a bench docket, and the clerk a minute docket and an order book. The court makes memoranda of its proceedings on its docket; the clerk does the same upon his minute docket; and the proceedings are then more fully entered in the order book, and are publicly read in open court, in the presence and hearing of the court, its officers, the parties, attorneys and bystanders who may be in attendance. It would seem, therefore, that the rule, that some memorandum or note of an order claimed to have been made by the court should be shown upon some of these dockets, was a safe and not an unreasonable one.

What we have said answers another question presented by the record, but not pressed in this case, viz.: Can the judge that tries a cause, in the record of which no entry of leave to file a bill of exceptions after the expiration of

Perkins v. The State.

the term appears, supply, in effect, such entry, by stating in the bill of exceptions made after the term, that such leave was given in the term? It answers it emphatically in the negative. That statement, when inserted in the bill of exceptions, becomes no proper part of such bill.

The leave given at the trial to file the bill of exceptions after the term is simply to file the bill after the term, which might, and necessarily would be, filed without such leave in the term, containing neither more nor less. The grant of leave therefore, to file the bill, should appear upon the record made at the time of the grant; and, where it does not so appear, a *nunc pro tunc* entry of such grant of leave can only be made, as we have seen, upon competent evidence that it was given in term by the court, and omitted to be entered of record. But if the judge, sixty or any other number of days after the expiration of the term, can insert, of his own volition, a binding statement that such leave was given, then he can, in effect, supply *nunc pro tunc* entries after the proceedings have ceased to be *in fieri*, without proof of any kind, which we have seen he can not do. See *Robinson v. Johnson*, 61 Ind. 535; *Boyd v. Blaisdell*, *supra*.

The circuit court did not err in refusing the order for a *nunc pro tunc* entry in this case.

The judgment is affirmed, with costs.

PERKINS v. THE STATE.

CRIMINAL LAW.—*Larceny.—Robbery.—False Pretences.—Money Paid to Avoid Arrest Threatened by One Falsely Personating Officer.*—On the trial of a defendant indicted for the larceny of certain bank-bills, the evidence on behalf of the State established, substantially, that the defendant had falsely represented to the prosecuting witness and another, that he was an officer

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Perkins v. The State.

having a warrant for the arrest of the latter on a charge of passing counterfeit money ; and that, to avoid threatened arrest and imprisonment, the prosecuting witness voluntarily, as the surety, and at the request, of the alleged criminal, and on his promise to repay, executed a promissory note, and paid the bank-bills in question, to the defendant.

Held, that, though the facts may constitute the crime of obtaining money, etc., on false pretences, the defendant is not guilty of either larceny or robbery.

From the Clinton Circuit Court.

A. E. Paige, S. O. Bayless and J. U. Gorman, for appellant.

T. W. Woollen, Attorney General, and *W. R. Moore*, Prosecuting Attorney, for the State.

WORDEN, C. J.—The appellant, Thomas Perkins, and one Lewis C. Baum, were jointly indicted in the court below, for the larceny of two bank-notes of the denominations and values, respectively, of five and ten dollars, the property of Joseph Mink.

The appellant was awarded a separate trial, upon which he was convicted and sentenced to imprisonment in the state-prison for the term of two years, a new trial having been denied him.

The case is before us on the evidence, from which it appears that the following is the substance of the case made by the State against the appellant :

Charles and Joseph Mink are brothers, living some seven miles apart, in Clinton county. It is to be inferred, that, on the 12th of November, 1878, Joseph Mink was in the town of Frankfort. On the 13th of November, 1878, the appellant and Baum drove to the residence of Charles, and the appellant went to the field where Charles was at work, leaving Baum sitting in the buggy. The appellant told Charles that his name was Johnson, and that he had a writ or warrant for his (Charles') arrest for passing a counterfeit half-dollar at Frankfort, on the day before. Charles having said that he had not been away from home for two weeks, the appellant said that he, Charles, was not the man they want-

Perkins v. The State.

ed, and asked him if he had any brothers. Charles told him that he had a brother Joseph, and where he lived. The appellant said that Joseph had passed counterfeit money the day before, at Frankfort; and that he, the appellant, was going to arrest him for it. He asked Charles if he would become bail for Joseph to keep him from going to jail if the appellant arrested him. Charles said that he would. The appellant and Baum then started away, and went to the residence of Joseph Mink, where they found him at work in his field. The appellant told Joseph that he was an officer, and had a warrant to arrest him for passing counterfeit money at Frankfort, on the day before. Joseph said he had no money to go to Frankfort and settle it with. Appellant said he could settle it there, if he had any money. Joseph said he had no money. Appellant said Joseph could go with him to his brother Charles, who had money. Accordingly the three started in the buggy and went to Charles.' Upon arriving at Charles,' the appellant and Baum said that if they would make up \$40 in money and a note for \$75 with good security, that would settle it. Baum said that Perkins was an officer and could settle any thing in the United States. Perkins said that any arrangement Joseph could make with Baum would be all right. After talking awhile, it was finally agreed that Joseph should pay to the appellant fifteen dollars in money, and that he and Charles should execute to him a note for seventy-five dollars, to settle the matter. This was accordingly done. The note was executed and the money paid. Joseph did not have the money, but Charles paid it to the appellant for him, to be afterward repaid by Joseph to Charles. The money was paid, and the note given, in order to prevent the arrest of Joseph and his being sent to jail. The money paid was a five and a ten dollar bill.

There was no pretence that the supposed counterfeit money had been passed to either the appellant or Baum;

Perkins v. The State.

but that the appellant was an officer having a warrant for the arrest of Joseph for passing the counterfeit money. Neither before nor at the time the money was paid and the note given, was there any menace or personal violence attempted, offered or threatened upon either of the Minks, by either the appellant or Baum. The only threat that was made was that they would take Joseph to jail, and that he would go to the penitentiary unless the matter was fixed up. Neither of the Minks was afraid, except that Joseph would be taken off and put in jail. The money was paid and the note given voluntarily, for the purpose of vesting the right and title thereto in the appellant, in order to secure to Joseph immunity from arrest and imprisonment. The money was paid, and the note given, without any expectation that either would be returned.

These are the material facts, stated as strongly in favor of the State as the evidence will warrant.

The question arises whether larceny can be predicated of the facts above stated. We are of opinion that it can not. It is clear, we think, that no robbery was perpetrated, in which might be included the crime of larceny.

The case is much like the one noticed in *Bicknell Crim. Prac.*, p. 320, as follows: "Where a party was threatened, at a mock auction, to be sent to prison unless she would pay for an article knocked down to her, but for which she had not bid, and a pretended constable was called in, who told her she must go with him or give him a shilling, and she gave him the shilling, not from any apprehension of personal danger, but for fear of being taken to prison—the court held that this was not robbery, but extortion by duress. 2 East's P. C. 732."

It is doubtless true in many cases, that, where a party obtains possession of property from the owner, with his consent, by a fraudulent trick or device, with the felonious intent to deprive the owner thereof, he may be guilty of larceny. *Huber v. The State*, 57 Ind. 341.

Osborn v. Storms.

But, so far as we are advised, this has never been held to be the case where the owner voluntarily parts with the possession, for the purpose and with the intention of parting with the title, without any expectation of its being returned, though he may have been induced thereto by the fraud of the person to whom the possession and title have been transferred. *Welsh v. The People*, 17 Ill. 339; *Stinson v. The People*, 43 Ill. 397; *Commonwealth v. Wilde*, 5 Gray, 83.

If the appellant is guilty of any offence, assuming that he was not an officer and had no warrant for the arrest of Joseph Mink, and it would seem that he may be, it is that of obtaining the money and note by means of the false pretence that he was such officer and had such warrant. 2 R. S. 1876, p. 436, sec. 27. But, on the facts shown, he is not guilty of larceny. *Williams v. The State*, 49 Ind. 367; *Jones v. The State*, 59 Ind. 229.

The judgment below is reversed, and the cause remanded.

The clerk will give notice for a return of the prisoner to abide the order of the court below.

OSBORN v. STORMS.

SUPREME COURT.—*Waiver of Error Assigned.*—An assignment of error in the Supreme Court is waived by the failure of the party assigning it to discuss it in his brief.

CONTINUANCE.—*Absent Witness.*—*Diligence.*—A motion for a continuance on account of an absent witness, which affirmatively shows that the applicant has not used due diligence to obtain the attendance of the witness, should be overruled.

REAL ESTATE, ACTION TO RECOVER.—*Improvements.*—*Special Denial of.*—

Osborn v. Storms.

Demurrer.—In an action to recover possession of real estate, wherein the defendant answered claiming an allowance for improvements, the plaintiff replied by general denial, and also by a special paragraph averring "that the defendant never made the improvements" alleged "while he was in possession * as owner, after he had executed the mortgage under which, upon a sale on foreclosure, the plaintiff claims title and in no other way," etc. Held, that such special paragraph is a special denial, and not open to demurrer.

SAME.—Evidence.—Transcript of Decree of Foreclosure.—Return Day.—A transcript of such decree of foreclosure and order of sale is competent evidence in such case, though no return day be specified therein, as by law that day is fixed by the day the transcript goes into the sheriff's hands.

SAME.—Improvements After Sale.—The defendant in such case can not give evidence of improvements made by him subsequent to the sale of the real estate by the sheriff.

SAME.—Improvement by Direction of Plaintiff's Attorney.—Agency.—Redemption.—Evidence that such improvements were made at the request of the plaintiff's attorney, in consideration of an extension of the time of redemption, is incompetent, unless accompanied by direct proof that the attorney had authority to make such request.

SAME.—Judgment can not be Attacked Collaterally.—Such decree can not be attacked collaterally by evidence that the plaintiff in the foreclosure suit was not the owner of the note and mortgage sued on by him.

From the Clinton Circuit Court.

J. C. Suit, M. Jones and J. L. Miller, for appellant.

J. M. Larue, F. B. Everett and C. E. Lake, for appellee.

BIDDLE, J.—Complaint to recover the possession of real estate.

The suit was commenced in the superior court of Tippecanoe county, and came by way of change of venue to the Clinton Circuit Court. Answer:

1. General denial;

2. That the defendant had made permanent improvements on the land, which he offers to set off against the damages.

Reply to second paragraph of answer:

1. General denial;

2. "That the defendant never made the improvements set up in the said paragraph, while he was in possession of

said premises as owner thereof, after he had executed the mortgage under which, upon a sale on foreclosure, the plaintiff claims title, and in no other way. Wherefore," etc.

A demurrer alleging a want of facts was overruled to the second paragraph of reply, and exceptions reserved.

Trial by jury; verdict for the appellee, that he is owner of the land, and that he recover two hundred dollars damages for its detention.

By a motion for a new trial, overruled, and exceptions, the appellant presents the following questions for our decision:

1. That the court erred in overruling the demurrer to the second paragraph of reply to the second paragraph of answer.

We think not. The paragraph is nothing more than a special denial, and is not open to demurrer.

2. That the Tippecanoe Superior Court erred in refusing to tax certain costs against the appellee, as no damage was recovered on said trial.

The appellant has not debated this point in his brief; it must therefore be held as waived.

3. Overruling appellant's motion to continue the cause, founded upon affidavit.

The term of court at which the trial was had commenced on the 12th day of March, 1877. The trial was commenced on the 3d day of April, 1877, upon which day the affidavit was filed, stating that the witness, whose testimony was sought, resided in an adjoining county, and that he had been subpoenaed on the 2d day of April—the day previous. This shows a lack of diligence. There is no intervening day between the service of the subpoena and the day of trial, and no excuse shown for not having had service sooner.

4. Overruling the objection of the appellant to the introduction of the transcript of a judgment of the Tippe-

canoe Circuit Court, because the seal of the court was not affixed to it.

Two very substantial grounds uphold the court's ruling on this question. No such objection was made to the introduction of the transcript at the trial, and the bill of exceptions shows that it had a seal.

5. Error in admitting as evidence a transcript of a judgment of the appellee against the appellant.

This is the decree of the foreclosure of a mortgage and sale, under which the appellee claims title. The objections made to it were, that it did not issue in the name of the State, was not directed to the sheriff, that there was no command to execute it, and it had no return day, but was simply a copy of the judgment and decree.

It did issue in the name of the State; the law directed it to the sheriff, and commanded him, as also did the words in the decree, to execute it; it needed no return day, that is fixed by the day it comes to hand to be executed; and it was simply the transcript of the judgment of foreclosure of a mortgage and decree of the sale of the mortgaged premises, which, by the statute and numerous decisions of this court, is the proper authority in such cases upon which the sheriff makes the sale. The court did not err upon this question.

6. Error in admitting as evidence two deeds executed by the sheriff under the above decrees. The objections made to them were, that they were "improper, immaterial and irrelevant" evidence. It seems to us that they were proper, material and relevant, and the appellant has shown us no objection to the contrary.

7. The appellant offered to prove that he "had made permanent and lasting improvements on the lands in question, subsequent to the 17th day of January, 1873, the date of the sheriff's sale to appellee, and before the 7th day of April, 1876, the time of the commencement of this action, to the amount in value of thirteen hundred dollars."

This evidence was properly rejected. The appellant could not make improvements on the land after he knew that he had no title, and knew that the appellee had title, and then plead them as a set-off against damages for detaining the possession of the land without title, nor could he give them in evidence at the trial.

8. The appellant offered to prove that the judgment plaintiff in the decree, given in evidence, was not the owner of the note and mortgage upon which it is founded.

This evidence was properly rejected. The appellant has not shown us upon what ground he expected to attack a record in this collateral way, and we know of no such doctrine, but quite to the contrary, namely, that a record, good upon its face, can not be attacked collaterally.

9. The appellant proposed to prove that he offered to make the improvements on the lands by the agreement of the appellee's attorney, upon the condition that he should have one year further time to redeem the lands, and that the appellee knew the improvements were being made.

This evidence was properly rejected. There was no evidence introduced, or offered, tending to show any such authority in the appellee's attorney. The relation of attorney and client would not confer any such authority. Besides, the evidence shows very clearly that the appellant had the land more than a year after the appellee acquired title. The fact that the appellee knew that the appellant was making improvements on the land at the time he held it by color of title, would in no wise bind the appellee to pay for them.

10. The appellant complains of the first, second, third, fifth, seventh and ninth instructions given by the court to the jury.

As those instructions are in harmony with the above rulings, and as we believe we are right in them, the court was right in giving the instructions. For these reasons we do not set them out at length.

Nye, Assignee, v. Lewis *et al.*

11. The court refused to give a series of instructions asked by the appellant.

As these instructions are all based on the views sought to be maintained by the appellant as above claimed, and as we have held these views to be unsound, it follows that the court did not err in refusing to give the instructions.

12. That the verdict is not sustained by sufficient evidence.

The ground of this objection taken by appellant is, that the decree upon which the land was sold was insufficient to authorize the sale. We have already held this decree good, and need not therefore notice the question further.

13. That the verdict is contrary to law.

The ground of this objection is, that the sheriff's return of the sale of the land upon the decree is not sufficient to uphold the title. We have already held the return good, and are not called upon to decide the question again.

We have thus decided the numerous questions presented by the appellant. They are so manifestly without sufficient ground to rest upon, that we do not cite the statutes nor former decisions of this court, in support of the present opinion—especially as the appellant has not cited a single authority in support of his views.

The judgment is affirmed at the costs of the appellant, with ten per cent. damages.

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NYE, ASSIGNEE, v. LEWIS ET AL.

BILL OF EXCEPTIONS.—*Time of Filing.*—*Leave, of Record, to File.*—A motion for a new trial, filed at the term at which trial was had, was overruled at the next term; but, though no time had been granted for filing a bill of exceptions, the court, at a subsequent term, signed a bill of exceptions, then filed, which stated that time had been given for the filing thereof. *Held*, that the bill of exceptions constitutes no part of the record.

Nye, Assignee, v. Lewis et al.

From the Marion Circuit Court.

J. T. Dye and *A. C. Harris*, for appellant.

B. Harrison, *C. C. Hines* and *W. H. H. Miller*, for appellees.

PERKINS, J.—This cause was tried at the September term, 1870, the trial resulting in a verdict for the defendants below, the appellees in this court. A motion for a new trial was filed at said term. The motion was not acted upon till the February term, 1871, when it was overruled. A bill of exceptions was not filed at that term, and the record shows no grant of leave to file one after the term.

But it appears that afterward, at the June term of said court, 1871, the plaintiff filed his bill of exceptions, which was signed on the day on which it was filed. The following is the concluding paragraph of the bill :

“And the court having considered said affidavits and motion (for a new trial), overruled said motion, to which ruling the plaintiff then and there excepted, and 120 days were given to file his bill of exceptions. And now, within said time, plaintiff files this his bill of exceptions, which is examined and approved by the court, as full, true and correct, and is now signed and made part of the record.

“June 23d, 1871.

JOHN S. TARKINGTON,

“Judge Marion C. C. Court.”

Final judgment was not rendered in the cause till a later day.

The first question for decision in the cause is, whether the above mentioned bill of exceptions is in the record. At common law the bill could have been signed and filed only at the term at which the cause was tried. 3 Bl. Com. 372. It is enacted in the code, that “time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court.” 2 R. S. 1876, p. 176, sec. 343.

This “special leave” must be shown by the record of

Nye, Assignee, v. Lewis *et al.*

the court to have been granted, and where it is not so shown it will not be presumed, in any case, to have been granted, but the contrary. And, where the record fails to show the grant of such special leave, the judge has no jurisdiction or power to sign a bill after the expiration of the term. This right to file a bill of exceptions, after the term has expired, is purely statutory, and must be exercised within and according to the statute. See *Rinehart v. Bowen*, 44 Ind. 353; *Greenup v. Crooks*, 50 Ind. 410.

The decisions of this court are not entirely uniform on this subject. But there ought to be a uniform rule upon this question of practice. And such uniformity may be obtained by an adherence to the provisions of the statute. See *Buskirk Prac.*, p. 144, *et seq.*

It is manifest to our minds that the Legislature never contemplated that the court or judge should assume to insert in the bill of exceptions, where it is signed after the term, that leave was given at the term to file the same after the term; because the statute does not require that the party preparing the bill of exceptions shall submit it, before it is signed by the judge, to the opposite party. *Robinson v. Johnson*, 61 Ind. 535; 2 R. S. 1876, p. 177, sec. 346. It would open the door to enormous abuse, therefore, if the judge should be allowed to insert in bills of exceptions statements that are not legitimate and proper parts of such bills, and thereby bind parties by such arbitrary and extra-judicial statements. See *Schoonover v. Reed*, *ante*, p. 313.

The bill of exceptions is not in the record, as a proper part thereof. In the absence of a bill of exceptions, we are unable to say the court erred in its ruling on the motion for a new trial.

The judgment is affirmed, with costs.

Hendrix *et al.* v. Hendrix, Executor.

HENDRIX ET AL. v. HENDRIX, EXECUTOR.

DECEDENTS' ESTATES.—*Action by Executor on Promissory Note.—Set-Off.—*

—*Rents of Testator's Real Estate.—Tort of Executor.*—In an action by an executor, on a promissory note executed to him, as such, for property belonging to the estate and sold by him to the defendant, the latter answered by way of set-off, seeking to charge the plaintiff, as executor, for rents accruing to the defendant since the executor's appointment, from real estate of which the testator died seized, collected by the executor and used for the benefit of the estate, which was solvent.

Held, on demurrer, that the answer is insufficient.

Held, also, that the executor individually, but not the estate, is liable for such rents.

SAME.—When Executor May Receive Rents.—An executor, as such, has no right to take possession of his testator's real estate, or to receive the rents thereof, unless authorized so to do by the will, or in the absence of any heir or devisee on the death of the testator.

From the Clay Circuit Court.

S. W. Curtis and — *Holliday*, for appellants.

I. M. Compton, G. A. Knight and *C. H. Knight*, for appellee.

NIBLACK, J.—The complaint in this case was by Eli Hendrix, executor of the last will of John Hendrix, Senior, deceased, against Joanna Hendrix and Frank W. Armstrong, upon a promissory note as follows:

"\$156.25. Brazil, Ind., October 29th, 1875.

"Nine months after date we promise to pay to the order of Eli Hendrix, executor, one hundred and fifty-six $\frac{25}{100}$ dollars, value received, without any relief from valuation and appraisal laws of the State of Indiana, with interest at 7 per cent. per annum from date, and ten per cent. after maturity until paid. JOANNA HENDRIX,

"FRANK W. ARMSTRONG."

A demurrer to the complaint was overruled, but the alleged insufficiency of the complaint is not insisted upon in this court.

The defendants answered in two paragraphs:

1. Payment before the commencement of the suit;

Hendrix et al. v. Hendrix, Executor.

2. "And for further answer in this behalf the defendant Joanna says, that she is the principal in said note, and her codefendant is surety on the same, which fact was well known to the plaintiff when he took the note; that the plaintiff, in his capacity as executor of the estate of John Hendrix, Sr., deceased, was, before the beginning of this suit, and still is, indebted to defendant Joanna Hendrix in the sum of six hundred dollars, for money and produce had and received by him from said defendant to the use of said estate, and that said estate is and was perfectly solvent, a bill of particulars of which is filed herewith and made a part hereof; that the said Eli, as such executor, received, and receipted the parties therefor, and placed said moneys so collected, and the proceeds of said corn, wheat and oats, in the funds belonging to the estate of said John, deceased, and paid the same out on the debts of the said John, contracted before his death. Defendant says that the estate received the benefit of said moneys so collected, and that the note in suit was given to plaintiff for property sold by him as such executor; that all of said rents and royalty were so received by him and so applied, and were the rents and profits of one-third of the real estate that the said John died seized of, and all accrued and became due this defendant since the said plaintiff took out letters of executorship. Defendant offers to set off a sufficient amount of said claim to satisfy any amount found due the plaintiff, and asks judgment for the residue, with costs and all other proper relief."

It is unnecessary to refer to the bill of particulars further than to say, that all the items in it are charges against the said Eli Hendrix, executor as above set forth, for one-third part of certain royalties and rents of various kinds, arising from real estate of which the said John Hendrix, Sr., died seized, and accruing since the death of said deceased, which it was alleged the said Eli Hendrix had collected in his capacity as such executor.

The plaintiff demurred to the second paragraph of the answer, and his demurrer was sustained.

Issues being joined on the first paragraph of the answer, the cause was tried by the court, resulting in a finding and judgment for the plaintiff for the amount of the note, with interest.

The decision of the court in sustaining the demurrer to the second paragraph of the answer constitutes the only question discussed by counsel in their argument here.

As a general rule an executor, as such, has no authority to take possession of the real estate of his testator, or to receive the rents and profits thereof, in the absence of an express provision of the will authorizing him to do so. The only exception to this rule is where there is no heir or devisee of the testator present at the time of his death to take possession of such real estate. 2 R. S. 1876, p. 535, secs. 110, 111.

It is not averred in this second paragraph of the answer, either that the plaintiff was empowered by the will to collect the rents and royalties charged against him, or that there was no heir or devisee present at the time of the death of the testator to take charge of the real estate left by him. In the absence of both such averments the allegation of the paragraph must be construed to mean, that the plaintiff collected the royalties and rents therein referred to, by virtue of his general authority as executor of the last will of John Hendrix, Sr., deceased, and used the proceeds arising therefrom, for the benefit of the estate of said decedent. Under such circumstances, the collection and use of such rents and royalties, for the benefit of the testator's estate, did not make such estate liable for a repayment of the amount of such rents and royalties to either the heirs or devisees of John Hendrix, Sr., under the will. The executor only became thereby personally liable to answer for what he had no authority to receive. *Hankins v. Kimball*, 57 Ind. 42; *Rodman v. Rodman*, 54 Ind. 444.

Scheible v. Law.

The court did not, therefore, err in sustaining the demurrer to the second paragraph of the answer.

The judgment is affirmed, at the costs of the appellants.

SCHEIBLE v. LAW.

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NUISANCE, ABATEMENT OF.—*Damages.—Complaint.—Obstruction of Water-course by Dam.—Surplusage.*—In an action by one adjoining proprietor against another, for damages and to abate a nuisance, the complaint alleged that a certain watercourse flowed over the lands of the plaintiff, onto and across those of the defendant; that a certain dam across such watercourse, erected on the lands of the defendant by his remote grantor, had been so increased in height, first by the defendant's immediate grantor, and then by the defendant himself, as to back water upon and over the lands of the plaintiff and others; that, in reconstructing the dam, the natural channel had been so narrowed by levees, etc., as to impede the natural flow of the water; and that, in consequence, the lands of the plaintiff had been, and would continue to be, overflowed and rendered unfit for cultivation, and his growing crops damaged.

Held, on demurrer, that the complaint is sufficient.

Held, also, that a complaint is not rendered insufficient merely because of surplusage contained therein.

SAME.—*Answer of License, by Deed from Plaintiff's Grantor.—Reply Interpreting Deed.—Harmless Ruling on Demurrer.*—The defendant in such action having answered, setting up a deed to the defendant's immediate grantor, from one who was the plaintiff's immediate, and the defendant's remote, grantor, prior to the grievance complained of, for "the right of way for a mill-race, with ground sufficient for abutments of a dam across" such watercourse, the plaintiff replied, setting out the state of facts under which the deed was executed, to assist in its interpretation.

Held, on demurrer to the reply, that the defendant was not authorized by such deed to so construct his dam as to injure the plaintiff's lands, and that the overruling of the demurrer, even if erroneous, was harmless.

SAME.—*Uncertainty in Interrogatories and Answers.—Judgment Non Obstante.—Record.*—The jury trying such cause, with their general verdict for the plaintiff, answered certain interrogatories, some of which, with the answers thereto, referred to certain diagrams and maps which had been used on the trial, but were not in the record on appeal to the Supreme Court.

Held, that judgment on the answers, notwithstanding the verdict, can not be rendered in such case.

Scheible v. Law.

SAME.—It appearing in such case that such watercourse had been so narrowed by the dam as to divide it into two branches, one only of which was crossed by the dam, a special finding that the dam did not extend across the watercourse is not inconsistent with the general verdict.

SAME.—*Variance.—Amendment.*—A variance between an immaterial allegation in the complaint and the answer to an interrogatory relating thereto will be deemed, in the Supreme Court, to have been amended below.

BILL OF EXCEPTIONS.—*Filed Too Late.—Record.*—A bill of exceptions filed at a term subsequent to the term at which the cause was tried, without leave granted that it might be so filed, forms no part of the record.

SAME.—*Supreme Court.—Evidence.—New Trial.*—Where, on appeal to the Supreme Court, the evidence is not all in the record, no question is presented as to whether or not the evidence sustains the verdict.

SAME.—*Refusal to Strike Out.—Harmless Error.*—Error in refusing to strike out parts of a pleading is not available in the Supreme Court.

From the Shelby Circuit Court.

B. F. Love, K. M. Hord, A. Blair and C. Sprague, for appellant.

O. J. Glessner and T. W. Woollen, for appellee.

PERKINS, J.—Suit by the appellee, against Scheible and Scheible, to recover damages occasioned by an alleged nuisance, and to procure the abatement of the same.

We copy the main portions of the complaint:

“The plaintiff, Joel Law, complains of Jacob M. Scheible and George C. Scheible, and says that the plaintiff, Joel Law, is now, and has been for many years last past, to wit, since the — day of —, 1861, seized in fee of the following described real estate, to wit: The north half of the north-east quarter of section thirty-two (32), in township twelve (12), range six (6) east, and that the defendants are, and have been since the 20th day of April, 1870, seized in fee of the following real estate, to wit: Part of the east half of the north-west quarter of section thirty-two (32), in said town and range aforesaid; that all of said real estate is situated in Shelby county, in the State of Indiana; that Blue River meanders through said lands of said defendants, and in part forms the dividing line between the lands of defendants and the lands

Scheible v. Law.

of plaintiff; that, in the year 1836, one Samuel Heistand built a mill on, and a mill-dam across, said river, on the lands now owned by said defendants, at the head of the race, six hundred feet above and north of the mill; that said dam, since said time until the — day of —, 1868, was kept up and maintained at a height of not exceeding four feet ten inches; that on the — day of —, 1868, one Joseph F. Fisher, the immediate grantor of said defendants, unlawfully raised said dam to the height of six feet aforesaid, and, on the 25th day of June, 1871, said defendants unlawfully built and constructed said dam to the height of eight feet ten inches, and from that time until the present said defendants have maintained and still maintain said dam at said last named height, to the great injury of the plaintiff and others having a common interest with him in the subject of this action, in this, to wit: It has [caused?] and will cause large portions of plaintiff's lands, and lands adjacent thereto, to be overflowed with water at all seasons of the year; and in time of freshets it has [caused] and will cause to plaintiff and others irreparable damage, by washing away soil, crops and improvements on lands; that said defendants, in reconstructing and raising said dam as aforesaid, so built and constructed the abutments, levees and attachments thereto, as to contract and narrow the channel of said river, thereby impeding the flow of the water at that point much more than it would have been impeded by a mere increase in the height of said dam; that, by reason aforesaid, plaintiff, during the years of 1870, '71 and '72, has, by the loss of crops and otherwise, sustained great damage, viz., in the sum of one thousand dollars. Wherefore," etc.

The plaintiff subsequently dismissed his suit as to defendant George C. Scheible.

A demurrer to the complaint, for want of facts, etc., was overruled, and exception entered.

Answer, in five paragraphs :

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Scheible v. Law.

1. Admitting the existence of the dam and race, but claiming the right to maintain them, and giving a history of the title to the land, from its purchase by James M. Elliott, and its conveyance to him, by deed from Thomas Wray, on the 9th of May, 1848 ;

2. Adverse possession for twenty years ;

3. Statute of limitations ;

4. License, and estoppel ;

5. General denial.

A demurrer to the affirmative paragraphs of answer was overruled, and exceptions entered.

The following deed was made a part of the first paragraph of the defendant's answer to the complaint. The deed was executed on the 9th of June, 1859 :

" William Law conveys and warrants to Samuel W. Elliott, of Shelby county, Indiana, for the sum of one hundred dollars, the following real estate in Shelby county, Indiana, to wit: The right of way for a mill-race, with ground sufficient for abutments of a dam across Blue River, wherever he should need it, and the right of entry of my land to build the same and keep it in repair, and all stone, gravel, earth or timber he may require for the repair of said mill-race and dam, levees, or banks, together with the right to extend and alter the said race and dam should the change of the river at any time make it necessary ; the said Elliott to pay a reasonable compensation for all valuable timber that he should take ; said land lying in sections 29 and 32, town 12, range 6."

The deed was acknowledged and recorded.

Reply in denial to all the affirmative paragraphs of the answer, and, by a second paragraph, to the first paragraph of the answer, setting out the state of facts under which the deed set out in the first paragraph of answer was made, for the purpose of aiding in its interpretation and construction, and showing the extent of its intended operation, as not enlarging the right to overflow adjoining land.

Scheible v. Law.

A motion to strike out, and demurrer to said second paragraph of reply, were overruled, and exceptions reserved.

Trial by jury. Verdict and answers to interrogatories as follows were returned into court :

" We, the jury, find for the plaintiff, Joel Law, and assess his damages at two hundred dollars ;" and answer interrogatories propounded by the plaintiff as follows :

" 1. State who was the owner of the Marietta Mill property, mentioned in the complaint, at the commencement of this suit.

" Ans. Jacob M. Scheible.

" 2. State what was the height of the dam complained of, at the time William Law made the deed to Samuel W. Elliott of the right to build the new dam and race.

" Ans. Four feet.

" 3. State the height of the dam complained of, June 20th, 1872, at the time this suit was brought.

" Ans. Seven feet and a half.

" 4. Did Jacob M. Scheible, the defendant, after he became the owner of said mill, and before the commencement of this suit, raise said dam? and, if so, how much?

" Ans. Yes; three feet.

" 4½. Is the dam at 'B,' above mill on map 'A,' used as a waste dam?

" Ans. Yes.

" 5. What is the present height of the dam complained of?

" Ans. Seven feet.

" 6. Were the lands of the plaintiff overflowed by back water from the mill pond or race, at any time prior to 1871, at any ordinary stage of water?

" Ans. No.

" 7. Are they now so overflowed, at an ordinary stage of water? and, if so, since when have they been so overflowed?

" Ans. Yes; since August 1st, 1871.

Scheible v. Law.

"8. If the jury find that the lands of the plaintiff have been overflowed by reason of the raising of the dam by the defendant, state how much damage the plaintiff had sustained, up to the 20th day of June, 1872, by reason of such overflow.

"Ans. Two hundred dollars.

"9. State if the dam in controversy in this suit, when first erected, was across the original channel of Blue River.

"Ans. Yes.

"10. State if the plaintiff's lands are overflowed from water coming down from the direction of Ague creek and the levee built on William Law's land?

"Ans. No.

"11. State how much of the height of the dam must be cut down to relieve the lands of the plaintiff of being overflowed at an ordinary stage of water.

"Ans. Thirty inches."

And the jury returned answers to interrogatories propounded by the defendant, as follows:

"1. What is the distance from the mill mentioned in the plaintiff's complaint to the dam in controversy?

"Ans. Seven hundred and thirty feet.

"2. Did William Law, on the 9th day of June, 1859, execute to Samuel W. Elliott a deed, a copy of which is filed with the defendant's first paragraph of answer, and marked 'Exhibit C'?

"Ans. Yes.

"3. If your answer to interrogatory two should be yes, was he, the said William Law, at the time he executed said deed to said Elliott the owner of the tract of land described in plaintiff's complaint, being the north half of the north-east quarter of section 32, township 12 north, of range 6 east, in Shelby county, Indiana?

"Ans. Yes.

"4. Was said William Law, at the time he executed

Scheible v. Law.

said deed to said Elliott, the owner of the south-east quarter of section twenty-nine, township twelve north, of range six east, in Shelby county, Indiana?

“ Ans. Yes.

“ 5. Did Samuel W. Elliott, after said deed was executed to him, build a dam across the channel of Blue River, in said section twenty-nine, township and range aforesaid, at the point ‘ D ’ on map ‘ A ’ ? and from and immediately above said point where he built said dam, did he dig a mill-race to and into a bayou, at the point ‘ C ’ on said map, and through said bayou did he conduct the water in and down said bayou to his mill by and past the point ‘ B,’ by which he propelled his said mill ? and, if so, when did he dig and construct said race, and thereby conduct said water from said Blue River to his said mill, through said race so dug and constructed by him ?

“ Ans. Yes ; and was dug in 1859.

“ 6. Was said race, so dug and constructed by him from said point ‘ D ’ on said map to said point ‘ C,’ and the bayou, into which said race was dug at said point ‘ C,’ and from that point down said bayou to the south side of section twenty-nine, on lands owned by said William Law, at the time said race was dug and constructed down said bayou ? Did said William Law own the tract of land described in plaintiff’s complaint, at the time said race was dug and constructed ?

“ Ans. Yes.

“ 7. Was the dam, referred to in plaintiff’s complaint, and of which he complains, across Blue River at the time the plaintiff commenced this suit ?

“ Ans. No.

“ 8. Was the dam, complained of by the plaintiff in his complaint, across Blue River at the time the defendant or defendants, or either of them, became the owner or owners

Scheible v. Law.

of the mill mentioned in the complaint, or at any time since?

"Ans. No.

"9. Was the dam, complained of by the plaintiff in his complaint, across Blue River at the time said Fisher became the owner of said mill, or at any time since?

"Ans. No.

"10. Was the dam complained of by the plaintiff in his complaint, across Blue River at the time said Fisher raised the same, if he did raise said dam?

"Ans. No.

"11. At the time said race was dug from the point 'D' to the point 'C,' into said bayou at the point 'C,' and the water conducted from said Blue River from the point 'D,' down said dug race to point 'C,' and down said bayou to said mill, did Blue River run either through said dug race or in said bayou, from the point 'C' to said mill at any point from 'D' to said mill? Or did not said Blue River, at that time, from said point 'D' to said mill, run in a channel west of said dam and race at said point 'B' on map 'A'?

"Ans. Yes; Blue River runs from the point 'D' in a channel west of said dam and race, at said point 'B.'

"12. How long has Blue River run from point 'A' to and opposite the mill, west of said dug race and west of said bayou, from the point 'C' to the mill and west of point 'B' at the dam?

"Ans. Blue River run west of point 'C' and west of point 'B' since the year 1859.

"13. When was the deed marked 'Exhibit C' recorded in the recorder's office of Shelby county, Indiana?

"Ans. On the 9th day of June, 1859.

"14. Has not said dam, at the point 'B.' ever since said new race was dug, constituted a part of the west bank and side of defendant's race to said mill?

Scheible v. Law.

"Ans. Yes; the dam has been a part of said west bank of said race, and also a waste dam.

"15. What is the fall from the point 'D' to the mill?

"Ans. Six feet and nine-tenths of a foot.

"16. If the water is thrown onto the plaintiff's tract of land by the dam in controversy having been raised by the defendants, or by Fisher, is it not thrown on the plaintiff's land by being backed up from the race through a tract of land adjoining said race, belonging to Comstock, lying south of and adjoining the plaintiff's tract of land, and from off said tract of land belonging to said Comstock, onto the plaintiff's tract of land described in the complaint?

"Ans. About two-thirds of the quantity of water that causes the overflow over the plaintiff's land comes over Comstock's land, and one-third of the water which causes said overflow comes from bayou 'A.'

"17. If the dam in controversy has been raised by the defendants, or by Fisher, or either of them, so as to throw the water from the race or mill-pond onto the tract of land adjoining the plaintiff's tract of land, so as to back the water over said lands belonging to said Comstock, onto the plaintiff's tract of land, then how much would the dam have to be cut down so as to prevent it from throwing the water back on the plaintiff's tract of land described in the complaint, and leaving the dam such height as to back the water up on the Comstock tract, but not such a height as to throw waters on the plaintiff's land adjoining and above the Comstock tract?

"Ans. The dam should be taken down thirty inches when on a level.

"18. If the defendants and Fisher, or either of them, raised the dam in controversy so as to throw the water onto any part of the plaintiff's tract of land described in the complaint, that was suitable for cultivation before they so

raised the dam, then how much of such lands of the plaintiff that were fit for cultivation before they, or either of them, raised the dam, was materially injured for cultivation by throwing the water onto the same by the raising of said dam by the defendants and said Fisher, or either of them? Give the number of acres, if any.

"Ans. About fifteen acres of land.

"19. If, by the raising of the dam in controversy by the defendants or said Fisher, the waters were thrown onto any of the plaintiff's lands described in the complaint, that were fit for cultivation previous to the raising of said dam, and before the commencement of this suit, then how much was the plaintiff damaged thereby from the 1st of August, 1871, to the 20th day of June, 1872, at the time of the commencement of this suit?

"Ans. At two hundred dollars.

"20. Is the stream of water, marked on map 'X' as Miller's Branch, a natural stream of water?

"Ans. Yes.

"21. How much lower, if any, is the lowest point of the dam in controversy, than the east side of the race or mill-pond from the mill up to point 'C' on map 'H,' except the mouth of bayou, P. O. Q?

"Ans. The bank is from six inches to four feet higher than the lowest point in the dam."

The defendant moved for judgment on the special findings, which was overruled, as was also a motion for a new trial. Exceptions were entered. Final judgment was entered for the plaintiff, on the general verdict.

The defendant moved "to strike out all that part of the judgment and order of the court, in the above entitled cause, which relates to the cutting down of the defendant's mill-dam in question in this suit, because the verdict of the jury does not warrant or authorize the above designated part of said judgment or any part thereof;

Scheible v. Law.

which motion the court overruled, to which ruling the defendant excepted at the time, and filed his bill of exceptions, which was then and there signed and sealed, July 8th, 1875.

An appeal was duly prosecuted to the Supreme Court by the defendant, in which court he has assigned errors as follows:

1. Overruling the demurrer to the complaint;
2. Overruling the demurrer to the second paragraph of reply;
3. Overruling appellant's motion for judgment on special findings of the jury;
4. Overruling motion for a new trial;
5. Overruling motion to strike out;
6. Overruling motion to strike out.

We proceed to consider the errors assigned.

The demurrer was properly overruled to the complaint. Damage for special injury from a public nuisance may be recovered by an individual. *Pettis v. Johnson*, 56 Ind. 139. See *Helwig v. Jordan*, 53 Ind. 21; *Mansur v. Haughey*, 60 Ind. 364; *Haag v. The Board, etc.*, 60 Ind. 511.

The complaint in this case contained much surplusage, but it contained allegations showing a cause of action, and the surplusage did not vitiate it.

If the court erred in overruling the demurrer to the second paragraph of the reply, as to which we express no opinion, the error was harmless. The deed, made an exhibit in the answer, did not, by its terms, authorize the grantee to raise a dam to a height that would create a nuisance, by overflowing the lands of the grantee adjoining those conveyed. The case of *Howard v. Bates*, 8 Met. 484, is not at all in point.

The court did not err in rendering judgment on the general verdict. The law is, that "When a trial by jury has been had, and a general verdict rendered, the judgment

must be in conformity to the verdict," (2 R. S. 1876, p. 186, sec. 370,) unless there has been, also, a special verdict or finding. When there has been such, "if the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." 2 R. S. 1876, p. 172, sec. 337.

And it is established by judicial decisions, that "The special findings of the jury override the general verdict only when both can not stand; and this antagonism must be apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issue, before the court can be called upon to give judgment against the party who has the general verdict in his favor." *Amidon v. Gaff*, 24 Ind. 128; *Delawter v. The Sand Creek Ditching Co.*, 26 Ind. 407; *Skillen v. Jones*, 44 Ind. 136; *Campbell v. Dutch*, 36 Ind. 504; *Morse v. Morse*, 25 Ind. 156; *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *Donohue v. Dyer*, 23 Ind. 521; *The Board of Commissioners, etc., v. Kromer*, 8 Ind. 446; *Wright v. Hughes*, 13 Ind. 109; *Manning v. Gasharie*, 27 Ind. 399; 2 R. S. 1876, p. 172, note; *Graham v. Graham*, 55 Ind. 23.

It has been decided, also, that "Where the special finding of a jury, on account of the language of an interrogatory and the answer thereto, is so uncertain that the meaning can not be definitely ascertained, such special finding will not warrant the court in disregarding the general verdict, and rendering judgment on the special finding." *Comer v. Himes*, 49 Ind. 482; 2 R. S. 1876, p. 173, note.

A mere perusal of the interrogatories propounded by the defendant, and the answers thereto, will satisfy any one that many of them are meaningless, when read from the record, in the absence of the lettered maps and diagrams upon which they were asked and answered. Those maps and diagrams are not in the record.

We think the antagonism between the general verdict

Scheible v. Law.

and the answers to interrogatories is not irreconcilable. The suit is for the raising of a dam across Blue River. The interrogatories ask, Was the dam across Blue River? and the answers are, No. Now, two facts have appeared in the case, viz.: That Blue River had been narrowed at the point of the dam by artificial means, so that a shorter dam sufficed, and that that river had been changed from its original bed, had been divided into two streams, etc. Now, the interrogatories asked for a conclusion, an opinion rather than a fact, on the state of facts existing. Instead of asking a question, making it definite as to the locality of the dam, the branch of the divided stream it was across, the question was asked, Was the dam across Blue River? The jury would answer such an interrogatory according to their opinion as to which division, which branch of the divided stream, should then be called Blue River. Or, from the narrowing of the stream mentioned, the answer might have meant that the dam did not extend entirely across what they understood to be Blue River.

It is also said that the answers show a fatal variance—that the complaint alleges that the original dam was built six hundred feet from the mill, while they now, by measurement, make the distance of the dam seven hundred and thirty feet. If the exact distance of the mill from the dam was a material allegation, we think the complaint was amendable, in this particular, and may be regarded as amended.

The court did not err in overruling the motion for judgment on the special findings or answers to interrogatories.

We proceed to the motion for a new trial.

The cause was tried and verdict in it rendered at the March term, 1875. The motion for a new trial was made and overruled at the May term, 1875. The bill of exceptions was filed in July, 1875. No bill of exceptions was

Pence, Administrator, v. Makepeace *et al.*

taken at the term at which the cause was tried, showing erroneous rulings occurring on the trial, nor does time, beyond the term, appear to have been given to prepare one. Such errors, therefore, if they occur, are not shown by the record. 2 R. S. 1876, p. 176, sec. 343. Nor, can we determine whether the verdict was sustained by the evidence, because it appears by the record that the evidence is not all contained in it. Certain lettered maps and diagrams were used in evidence, which are not in the record. How important, necessary even, they were to enable the jury and the court to apply, and duly appreciate the force of, oral testimony given in the cause, in reference to localities and distances, has been made unmistakably manifest by the answers to interrogatories which are embodied in the record.

The fifth and sixth alleged errors of the court, in refusing to strike out parts of pleadings, are unavailable. *Galvin v. The State, ex rel.*, 64 Ind. 96, and cases cited.

The judgment is affirmed, with costs.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

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| 65 | 345 |
| 136 | 578 |
| 65 | 845 |
| 163 | 390 |

PENCE, ADMINISTRATOR, v. MAKEPEACE 'ET AL.

LIFE INSURANCE.—*Policy on Husband's Life, for Benefit of His Wife, Belongs to Her.*—*Assignment of.*—An insurance policy, issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery thereof to another, even during the lifetime of the husband, can be made only by her.

SAME.—*Assignment and Delivery*—*Interrogatory to Jury.*—Where the title to the proceeds of such an insurance policy is in issue, and an interrogatory is propounded to the jury as to whether or not such policy had been assigned and delivered (without specifying *by* whom,) to a third person, the

Pence, Administrator, v. Makepeace *et al.*

jury have a right to assume that the interrogatory is as to whether or not such assignment and delivery had been made by the person to whom the proceeds belonged, or by her agent, and they may properly answer accordingly.

SAME.—*Fraud.—Premiums Paid by Insolvent.*—Only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent on a policy of insurance upon his life for the benefit of his wife and children be recovered by his creditors ; and in no event can any excess over the amount of the premiums so paid be recovered by them.

SAME.—*Denial of Assignment.—Non Est Factum.—Issue.—Insolvency.—Interpleader.*—A husband, upon whose life an insurance company had issued a policy for the benefit of his wife, having died, the insurance company, by a bill of interpleader, brought the money due on the policy into court, asking the court to determine to whom it belonged, and alleging that both the widow and a third person claimed to be entitled to the same. Whereupon the latter alleged title to the money under an assignment of the policy to him, by the wife and her husband, in writing, in the lifetime of the latter, to secure a debt due from him to such assignee, and that the policy, on which he had paid several premiums, was in his possession, to which she answered by a verified denial of the assignment.

Held, that the only issue between the claimants was as to the making of such assignment, and that the solvency of the husband when he procured the policy and paid the premiums thereon is not, and could not by either of them be put, in issue.

SAME.—*Title to Policy.—Assignment and Delivery by Husband, without Wife's Authority.—Possession.—Presumption.—Instructions.*—It was proper, under such issue, to instruct the jury, that such policy, when issued, belonged to the wife absolutely ; that "it could not be assigned or transferred * by her husband * without her authority ;" that, to prove the assignment claimed, the assignee "must prove, not only that she signed her name to the assignment, but must prove, also, that she either delivered, or authorized the delivery of, the policy ;" that "possession of the policy and payment of premiums upon it by" the assignee "could give him no right to it, even though it appeared to be assigned to him, if" the wife "had not signed the assignment or authorized" its delivery to him ; and that they could not presume that the wife had authorized her husband to make the assignment.

SAME.—There being no evidence that she had authorized another to sign her name to the assignment, it was not necessary to instruct the jury on that point.

EVIDENCE.—*Admissions.*—Verbal admissions or statements, consisting of mere repetitions of oral statements previously made, should be received as evidence with great caution ; but admissions deliberately made, and well understood, are entitled to consideration, especially when they are adverse to the interest of the party making them.

Pence, Administrator, v. Makepeace *et al.*

SAME.—Testimony of Subscribing Witness.—The testimony of a subscribing witness, in whose presence a written instrument purports to have been executed, is the best, but not the only, evidence of its execution.

PRACTICE.—Supreme Court.—Objection to Evidence.—Leading Question.—The objection, that a question put to a witness is leading, can not be made for the first time in the Supreme Court.

SAME.—Alteration.—Question Assuming Fact to be Proved.—A question put to a witness, as to whether or not he had caused a certain alteration apparent upon the face of a written instrument already in evidence, is not objectionable as assuming a fact yet to be proved.

SAME.—Question rendered Harmless by Answer.—An answer by a witness, disclosing his ignorance concerning a matter about which he is questioned, renders the question itself harmless.

INSTRUCTION.—Blank.—Failure to Instruct Fully.—An omission or blank left in an instruction, or an instruction covering part only of the facts, may be cured by asking an additional instruction or the filling of the blank.

SAME.—Certiorari.—Harmless Error.—Amendment.—Where a material part of an instruction is left blank in the record, a *certiorari* should be procured; but a blank in an instruction, which does not mislead the jury, is harmless.

From the Hamilton Circuit Court.

J. A. Harrison, A. G. Porter, N. P. Fishback, G. T. Porter, J. W. Gordon, R. N. Lamb and W. M. Shepard, for appellant.

M. S. Robinson and J. W. Lovett, for appellees.

Howk, J.—On the 17th day of February, 1875, the Connecticut Mutual Life Insurance Company filed, in the office of the clerk of the Madison Circuit Court, its complaint in the nature of a bill of interpleader against the appellee, Melissa C. Makepeace, and John E. Corwin, then the administrator of the estate of Allen W. Makepeace, deceased.

In this complaint the insurance company alleged, in substance, that theretofore, to wit, on the — day of —, upon the application of one James T. Makepeace, of Madison county, Indiana, and upon the payment by him, then and thenceforward to the time of his death, of certain annual premiums, said company executed upon the life of said James, and delivered to him for the benefit of the said Melissa, to whom the same was made payable, a certain

Pence, Administrator, v. Makepeace *et al.*

policy of insurance on the life of the said James, whereby, in consideration of the payment of said premiums in said application and policy stated, the said insurance company undertook, on the death of the said James, to pay to the said Melissa the sum of \$5,000.00, which said policy, No. 38,193, was then in the hands of the said Corwin, who claimed ownership in the same, as thereafter stated; that afterward, and during the lifetime of the said James, the said Melissa, for a valuable consideration and with the consent of her said husband, as was claimed by said Corwin, sold and assigned the said policy to one Allen W. Makepeace, then in life, who held the same, claiming title thereto, to the time of his death on the — day of —; that afterward the said Corwin was duly appointed, and qualified, as administrator of said Allen, and as such was then claiming of said insurance company the payment to him of said policy; that on the — day of —, the said James T. Makepeace died, whereby, upon the expiration of — days, and upon due proof of said death, etc., the said sum of \$5,000.00 became due and payable by said company to whichever party might in law be entitled thereto; that the said insurance company was then ready to pay said money; that the said Melissa then disavowed the making of said assignment and claimed the payment to her of said money, and forbade the payment to any other person; that each of the said parties so made and asserted claims to said money, in apparent good faith, and without any collusion or understanding whatever with said insurance company. Wherefore, as the said company was not advised as to who had the better right to said money, and in order that the said company might avoid any controversy in the premises, and that the Madison Circuit Court might award said money to the party entitled thereto, the said company brought said sum of \$5,000.00 into court, and prayed that the court would make an order for the deposit of the same until the rights of the said parties were determined; that the said parties might

Pence, Administrator, v. Makepeace *et al.*

be required to interplead and settle their rights in the premises; that the said company might be discharged, with its costs, from further liability to either party in the premises; that, on rendering final judgment in the premises, the court would order the production and surrender of said policy, and for other proper relief.

This complaint or bill of interpleader was duly verified by the oath of the general agent, in this State, of the Connecticut Mutual Life Insurance Company.

Thereupon, on the 22d day of February, 1875, the said John E. Corwin, administrator of the estate of said Allen W. Makepeace, deceased, appeared in said cause and filed what is called his cross complaint therein against the appellee Melissa C. Makepeace, admitting the truth of the matters stated in the complaint or bill of said insurance company, and setting up his title to said policy of insurance. In said cross complaint it was alleged, among other things, that the said James T. Makepeace, on the — day of —, 1871, was indebted to said Corwin, as such administrator, in a large sum of money, evidenced by his three notes, particularly described, then justly due and wholly unpaid, the aggregate amount of which notes was more than double the amount of said policy of insurance; that (the said James T. Makepeace being then in full life) the appellee Melissa C. Makepeace, then the lawful wife of, and cohabiting with, said James T. Makepeace, in consideration and in part payment of said debt, and of one dollar to her paid by said Corwin, by and with the consent of her said husband, fully and completely transferred and assigned all her right, title and interest in said policy to the said Corwin, administrator, all of which was evidenced by her endorsement thereon, signed by her and said James T. Makepeace, and duly acknowledged before a justice of the peace, as appeared by his certificate thereto attached, a copy of which assignment and certificate was filed with said cross complaint; that, at the time of such endorse-

Pence, Administrator, *v.* Makepeace *et al.*

ment, the appellee Melissa C. Makepeace delivered said policy of insurance to said Corwin, for said purpose and consideration, and it was agreed, that, if he should pay any premiums then unpaid on the same, such premiums and those already paid by said administrator should be deducted from the sum realized on said policy, and the residue applied in part payment of said notes and debts, so owing as aforesaid by said James T. Makepeace; that said Corwin, as such administrator, and said Allen W. Makepeace, in his lifetime, paid certain specified annual premiums, at certain specified times; that all the said notes and premiums paid, with interest thereon, remained due and wholly unpaid, except by said transfer of said policy of insurance; that, ever since the said assignment, the said Corwin, administrator, had possession of said policy, and he offered to bring it into court and deliver it up to said insurance company upon the payment to him of the amount thereof, or as the court might thereafter award and adjudge, and he filed a copy of said policy with his cross complaint; that the said James T. Makepeace died on the 16th day of August, 1874, and the said Corwin, administrator, at an expense of \$30, made sufficient proof to require the payment of said policy, and the said insurance company would pay the same to him if the appellee Melissa C. Makepeace did not pretend to hold an interest in said policy; and that the appellee Melissa C. Makepeace had no interest whatever in, nor right to, said policy or money. Wherefore the said John E. Corwin, administrator, asked judgment against the appellee Melissa C. Makepeace, that the said money belonged and should be paid to him for the use of the estate of said Allen W. Makepeace, deceased, by the said insurance company, and for other proper relief.

We give, in this connection, a copy of the alleged assignment of said policy of insurance, mentioned in and filed with said Corwin's so-called cross complaint, as follows:

"In consideration of the sum of one dollar to me in hand paid, and for other valuable considerations, I hereby assign, transfer and set over all my right, title and interest in policy No. 38,193, in The Connecticut Mutual Life Insurance Company of Hartford, to John E. Corwin, of Madison county, State of Indiana, this 30th day of December, 1871. (Signed,) MELISSA C. MAKEPEACE,

"J. T. MAKEPEACE."

"In presence of Wm. B. Dilts."

To this assignment, there was appended a certificate of acknowledgment by one R. J. Hall, described therein as a justice of the peace of Madison county, Indiana, in the ordinary form, to the effect that before him "personally came Melissa C. Makepeace and acknowledged the annexed assignment to be her free and voluntary act and deed." This certificate was dated on the 30th day of December, 1871, the date of said assignment.

The said John E. Corwin, administrator, and the appellee Melissa C. Makepeace appeared in open court at the March term, 1875, of the Madison Circuit Court, and mutually agreed of record, each with the other, that the said sum of five thousand dollars should be deposited by said insurance company, for safe-keeping, in the First National Bank of Indianapolis, and that, upon the filing with the clerk of said court of a proper certificate of deposit, payable to the order of the clerk of said court whenever ordered by the court, the said Connecticut Mutual Life Insurance Company should be fully discharged from all further liability as to said sum of money in controversy in this suit.

The appellee Melissa C. Makepeace answered the complaint of the insurance company and the cross complaint of said John E. Corwin, administrator, in a single paragraph, duly verified by her oath, wherein she admitted all the allegations of said complaint and all the allegations of said cross complaint, except so much of said cross com-

Pence, Administrator, v. Makepeace *et al.*

plaint as alleged the transfer and assignment of her right, title and interest, to the said John E. Corwin, administrator, in and to the said policy of insurance, or the acknowledgment thereof by her, or that she ever delivered the said policy of insurance to said Corwin, for the purpose and consideration alleged in said cross complaint, or for any other purpose or consideration, or that she made any agreement whatever with the said John E. Corwin, in relation to said policy of insurance, which allegations in said cross complaint she denied; and she further said, that she never assigned, delivered or endorsed, in writing or otherwise, the said policy of insurance to the said John E. Corwin, administrator as aforesaid or otherwise, and that she never authorized or empowered any other person to endorse, assign or transfer said policy to said John E. Corwin, as such administrator or otherwise; and that the said assignment was not her act and deed, and was never executed by her. Wherefore she asked judgment against the said John E. Corwin, in this action, that the money due upon the said policy of insurance should be paid to her, etc.

The said John E. Corwin having resigned his trust as administrator of the estate of said Allen W. Makepeace, deceased, and the appellant, John W. Pence, having been duly appointed and qualified as administrator *de bonis non* of said decedent's estate, on motion of said Pence he was substituted as a party to this action, in the room and stead of the said John E. Corwin, and on his further motion, supported by affidavit, the venue of the action was changed from the Madison Circuit Court to the court below.

In this latter court the cause was tried by a jury, and a general verdict was returned in favor of the appellee Melissa C. Makepeace; and with their general verdict the jury also returned into court their special findings as to particular questions of fact, submitted to them by the appellant, under the direction of the court, as follows:

Pence, Administrator, v. Makepeace *et al.*

"1. Was not policy No. 38,193, about which this suit has arisen, delivered to John E. Corwin, administrator of the estate of Allen W. Makepeace, deceased, as security for a debt from James T. Makepeace and Samuel Dusang to the said estate?

"Ans. No.

"2. At the time the said policy of insurance was delivered to said John E. Corwin, was not the written assignment endorsed thereon, with the signatures of James T. Makepeace and Melissa C. Makepeace thereunder written, and the certificate of R. J. Hall, justice, attached thereto as it now appears?

"Ans. No.

"3. Is not the copy of the said policy of insurance, and the assignment thereof, filed with the complaint in this cause, a correct copy of each of said documents?

"Ans. No.

"4. Did not James T. Makepeace, deceased, deliver to said John E. Corwin, along with said policy and assignment thereof, a mortgage made by himself and Melissa C. Makepeace, as part security for the same debt owed by himself and Samuel Dusang?

"Ans. No.

"5. Did not Melissa C. Makepeace sign and acknowledge the mortgage, delivered at the same time with the policy to said Corwin?

"Ans. No.

"6. Did not Melissa C. Makepeace sign and acknowledge the assignment upon the policy of insurance, before the same was delivered to said Corwin?

"Ans. No.

"7. Did not John E. Corwin, administrator, etc., pay the last three premiums paid upon the said policy of insurance?

"Ans. Yes.

Pence, Administrator, v. Makepeace *et al.*

"8. Is there not still due, upon the indebtedness of James T. Makepeace and Samuel Dusang, for which they executed their notes on the 30th day of December, 1871, including the amount paid as premiums on said policy, and interest, the sum of \$6,806.51?

"Ans. No."

The appellant moved the court in writing for a new trial, which motion was overruled, and to this decision he excepted. The court then rendered judgment upon and in accordance with the general verdict, that the appellee Melissa C. Makepeace was entitled to said sum of five thousand dollars, the amount of said policy of insurance, and that the appellant had no right, title, interest or claim in or to the said policy, or said sum of money, or any part thereof, and that said appellee recover of the appellant her costs in this suit expended, etc., to all of which the appellant objected and excepted, and has appealed therefrom to this court.

The only error assigned by the appellant, in this court, is the decision of the court below in overruling his motion for a new trial. Many causes were assigned by the appellant for such new trial; but of these we will only consider such as his learned counsel have presented and discussed in their brief of this cause in this court, and this we will do in the same order in which his counsel have presented them.

The appellant's attorneys have criticised, at great length and with some severity, the special findings of the jury, in answer to the appellant's interrogatories. We do not propose to follow counsel through this criticism, nor to comment thereon in this opinion. We may say generally, that it has seemed to us, from our examination of the record of this cause, that the answers of the jury, complained of by counsel, were brought out by the remarkable character of the interrogatories to which the jury were required to respond. These interrogatories were adroitly and skilfully

Pence, Administrator, v. Makepeace *et al.*

prepared, by counsel learned in the law and experienced in its practice. The phraseology thereof, and the words used therein, were such that the interrogatories might convey a two-fold meaning; especially so where an allusion is made or implied to an assignment of the policy of insurance, and the alleged delivery of such assignment. Of course the word "deliver," as applied to a necessary part of the execution of every written instrument, means something more than the mere manual delivery of the instrument. The delivery of a writing, as a part of its execution, can only be made by a person lawfully authorized to execute the writing, or at least to make delivery thereof. With these views in mind, one can readily understand how an intelligent jury, if they believed, as they had the right to do, the appellee's evidence, might honestly and truthfully answer, as they did, the appellant's interrogatories, and why the appellant's attorneys should be so much dissatisfied, apparently, with the unexpected answers of the jury. Take, for example, the first interrogatory above set out, submitted to the jury by the appellant; the actual manual delivery of the policy of insurance to John E. Corwin, by some one, and perhaps as a security for the debt mentioned in the interrogatory, were unimportant and immaterial facts, which could have no possible bearing upon the proper decision of this cause, except upon the hypothesis that such delivery was made either by the appellee Melissa C. Makepeace, in person, or by some one thereunto by her lawfully authorized. The policy of insurance, prior to the alleged assignment thereof to John E. Corwin, was undoubtedly the property of Melissa C. Makepeace. This fact the appellant is in no condition to controvert, because it is one of the fundamental facts which constitute his cause of action in this case. If the appellee owned the policy, she alone could deliver it, in the sense of an assignment by delivery; and it is quite clear, we think, that the word "delivered" was used in that sense, in the first interrogatory. It seems

Pence, Administrator, v. Makepeace *et al.*

to us that the jury might well conclude, that the purpose of the first interrogatory was to ascertain whether they did not find that the policy of insurance had been delivered, that is, assigned by delivery, by the appellee to John E. Corwin. If the jury thus construed, as they well might, the first interrogatory, and if they believed, as they might, the appellee's evidence in regard to such delivery, then they might honestly and truthfully answer the interrogatory, as they did, in the negative.

What we have said in regard to this first interrogatory is applicable to the other interrogatories propounded by the appellant to the jury trying the cause. They were susceptible of a two-fold construction; they had a covert or implied meaning, which differed from their apparent meaning, and the jury had the right, we think, to ascertain the intent and purpose of the interrogatory if they could, and to answer it accordingly, but without doing violence to the language used therein.

We have failed to find, from our examination of the interrogatories and the answers of the jury thereto, and the evidence bearing thereon, that, as the appellant's counsel claim in argument, "There is such a mass of falsehood in the answers to these interrogatories, that they destroy confidence in the honesty of the jury's intention, and render all their findings not only doubtful but worthless."

It is insisted in argument, by the appellant's attorneys, that the court erred in permitting the appellee to propound the following question to a witness in her behalf: "Did you change the date in the mortgage? Is that your blurring there and blotting?"

The appellant objected to this question, "on the ground that counsel assumed that an obliteration had taken place, without any proof." In this court, the appellant's counsel object to the question, because "it is directly leading." It is a sufficient answer to this objection to say, that it was not made in the court below, and it cannot be made for the

first time in this court. This rule is so well settled that we need not cite authorities in its support. As to the objection to the question made in the circuit court, it may be said, that, as the mortgage mentioned was in evidence, of course the blur or blot therein was also in evidence, and afforded, perhaps, the very best proof that could be made of such blur or blot. We think that the appellant's objection to the question propounded was not well taken; and we would not have noticed it if counsel had not, in argument, insisted upon its validity with so much earnestness. Even if the ruling of the court had been erroneous, and certainly it was not, it seems to us that the error would have been harmless, for the witness answered the question objected to, as follows: "I can not say in regard to the change or blurring of that, Colonel; I don't know about that." We fail to see how the ignorance of the witness, of the fact about which he was questioned, could possibly harm the appellant; and this court has always refused to reverse a judgment for a harmless error.

We pass now to the consideration of the instructions of the court, complained of by the appellant's counsel as erroneous. The claim of the appellant to the policy and money in controversy, it must be borne in mind, in considering the instructions, is founded exclusively upon an alleged assignment of the policy, by the appellee, to the said John E. Corwin. The only issue tendered by the appellee for trial, in this cause, was formed by her denial under oath of the execution by her of the assignment of said policy.

The third instruction, given by the court at the appellee's request, was as follows:

"3. The policy of insurance, being payable to Melissa C. Makepeace, vested in her alone the absolute ownership of it, and it could not be assigned or transferred to Corwin or any other person, by her husband or any other person, without her authority; and an assignment or delivery of

Pence, Administrator, v. Makepeace *et al.*

the policy to Corwin by the husband of the defendant, without her authority, would not bind her in any respect."

The appellant's counsel, in discussing the exception to this instruction, have assumed a position which is untenable by the appellant, in this case, under the allegations of his cross complaint. It is insisted by his counsel, that the instruction quoted was erroneous, because it informed the jury that the absolute ownership of the policy of insurance, being payable to the appellee, was vested in her; and that the policy could not be assigned or transferred to Corwin or any other person, by her husband or any other person, without her authority; and that an assignment or delivery of the policy to Corwin, by her husband, without her authority, would not bind her in any respect. It is very clear, we think, that this instruction clearly stated the law applicable to the case made by the allegations of the appellant's cross complaint. The argument of the appellant's counsel, against the instruction, is addressed to a case *dehors* the record of this cause. They insist, that, because the evidence on the trial showed that James T. Makepeace, the appellee's husband, was probably insolvent at the time he procured the issue of the policy and at the times of the payment by him of the several premiums thereon, then and subsequently as they became due, the premiums thus paid were fraudulent as against his existing creditors, of whom the appellant as the successor of Corwin was one; and that, as against such creditors, the appellee was not the absolute owner of the policy, but held it merely as a *quasi* trustee for the benefit of such creditors. It is enough for us to say, perhaps, in response to this argument, that it is not applicable to the case made by the averments of the appellant's cross complaint, and by the issue joined thereon. We need not and do not decide, in this case, what effect, if any, the alleged insolvency of James T. Makepeace might possibly have upon the appellee's title

Pence, Administrator, v. Makepeace *et al.*

to the policy of insurance or to the money derived therefrom; for that question was neither tried nor decided by the court below, in this case, nor is it presented by the record of this cause for our decision. The appellant had no standing in the circuit court, under the allegations of his cross complaint, and has none in this court, as the record comes before us, save and except under and by virtue of the alleged assignment of the policy of insurance, executed by the appellee, as the payee of the policy, to said John E. Corwin, as the predecessor of the appellant in his trust. As between the appellee and the appellant, under the averments of the cross complaint and the issue joined thereon, the absolute title and ownership of the appellee of, in, and to the policy of insurance, prior to and until the date of the alleged assignment thereof, were not and could not be called in question in this case; for the appellant, as well as the appellee, founded his title and claim to the policy, and to the money derived therefrom, upon the absolute ownership of the appellee of the policy in question, under and by reason of the fact that she was the payee or beneficiary named in the policy. Besides, where it appears, as it does in this case, that the policy of insurance has been procured and taken out by a husband and father upon his own life, and has been made payable to his wife, with the evident and only view and purpose of making suitable and necessary provision for the comfort, support and maintenance of his wife and family, after his removal by death, we would hesitate long, and the proof that the premiums paid were grossly fraudulent, as against existing creditors, would have to be clear and convincing, before we could be induced to hold and decide that the proceeds of the policy, or any part thereof, might be diverted from the beneficiary named in the policy, and applied to the payment of the debts of the assured. The procurement of a policy of life insurance, as a provision for the family of the assured in the event of his

Pence, Administrator, v. Makepeace *et al.*

death, and the payment of premiums thereon, by a person insolvent or of limited means, whose wife and family may be dependent upon him and his labor for the comforts and even the necessities of life, are acts to be fostered and encouraged by the law. For these acts are not hostile to, but we think are in full accordance with, those provisions of our law, which bear upon the rights and duties incident to the family relation. Society can not be benefited by the abject poverty or destitution of any family; but, on the contrary, its welfare or well-being is largely dependent upon the welfare or well-being of each and every family.

A necessary provision for his own household is a duty enjoined upon every man, by divine as well as human law, and unless the acts of a party, in making such provision as was made by James T. Makepeace in the case now before us, are clearly and grossly fraudulent, we would be very loth to divert such provision, or any part thereof, from the purpose for which it was intended, and, leaving the widow and the orphan destitute, apply such provision, or a part thereof, to a purpose never contemplated. If, however, it were conceded, which we do not concede, that the creditor of the assured might, in any case, institute and maintain an action for the recovery of any part of the amount of a policy of insurance, procured by an insolvent debtor upon his own life for the benefit of his wife or family, upon the ground that the premiums therefor were paid with money, which ought to have been applied to the payment of the debt of the assured to such creditor, and that such payment of such premiums by the assured was a fraud upon the rights of such creditor; we are clearly of the opinion, that the very utmost which the creditor could possibly recover in such action would be the aggregate amount of the premiums thus paid. The creditor could not, in any event, derive a profit from, or recover aught more than, the sums of money actually paid by the debtor in premiums upon a policy of insurance upon his

own life, payable to or for the benefit of his wife, or any member of his family.

But we have digressed considerably from the consideration of the third instruction of the court to the jury trying the cause; not more so, however, than the appellant's counsel digressed, in argument, from the same subject.

We think that the instruction contained a correct statement of the law applicable to the case made both by the pleadings and the evidence, and therefore we hold that no error was committed by the court in giving this instruction.

The fourth and fifth instructions are complained of as erroneous, and are considered together, in argument, by the appellant's counsel, because, they say, "they imperfectly repeat each other, and so reiterate error." These instructions were as follows:

"4. In order to prove an assignment of the policy to Corwin, by the defendant Melissa C. Makepeace, the plaintiff must prove, not only that she signed her name to the assignment, but must prove, also, that she either delivered, or authorized the delivery of, the policy to Corwin.

"5. Possession of the policy, and payments of premiums upon it, by Corwin, either as administrator of said estate or otherwise, could give him no right to it, even though it appeared to be assigned to him, if the defendant Melissa Makepeace had not signed the assignment, or authorized its delivery to him."

The objection to the first of these two instructions, as we understand counsel, is rather a "play upon words," or the meaning of them, than an objection to the law of the instruction. The jury were informed, that, for the purpose of proving the alleged assignment of the policy by Melissa C. Makepeace, the appellant must prove, not only that she signed her name to the

Pence, Administrator, v. Makepeace *et al.*

assignment, but that she either delivered, or authorized the delivery of, the policy of insurance. The law of this instruction, that delivery is an essential part of the execution of any written instrument, is elementary law, which we do not understand that counsel question. It is objected, however, that the instruction was defective, because, while it informed the jury that the appellant must prove that the appellee "signed her name to the assignment," yet it omitted "all mention of, or allusion to, the possibility of her signing by another, that is, authorizing some one to sign for her." There are several good and sufficient answers to this objection. It was not necessary for the court to make "mention of, or allusion to, the possibility," when there was no evidence before the court and jury, tending to show that the appellee had ever authorized any one to sign "her name to the assignment." An effort was made by the appellant to show that the signature of the appellee's name to the alleged assignment of the policy was in her handwriting; but the appellant did not attempt to prove that the signature was in the handwriting of any one authorized by her to sign her name to the assignment. The fourth instruction of the court was applicable to and covered the case made by the evidence, on the point under consideration, and this, we think, was all that was necessary. Besides, the record shows that the court gave the jury every instruction asked for by the appellant; but it does not appear, that in these instructions, prepared by the appellant's learned attorneys, they made any "mention of, or allusion to, the possibility," that the appellee might have authorized some one to sign the assignment for her. If there had been evidence before the jury, tending, even remotely, to show that the "possibility" alluded to even verged upon probability, we can not doubt that the appellant's counsel would have requested the court, and that the court would have promptly complied with the request, to

Pence, Administrator, v. Makepeace *et al.*

instruct the jury, that, if the appellee's name was signed to the assignment by any one authorized by her to sign it for her, then it must be regarded as her signature. For this would have been merely an application to the case on trial of the old legal maxim, "familiar as a household word," of *qui facit per alium, facit per se*. The fourth instruction of the court was not erroneous.

Of the fifth instruction, it is said by the appellant, that it is built upon the fourth instruction, which, we are told by his counsel, is a "bad foundation." As we have reached the conclusion, that the fourth instruction correctly stated the law applicable to the case and the evidence, we must regard it as a good foundation; and, therefore, we think it is unnecessary for us to comment on the fifth instruction. It seems to us, that the court committed no error in giving the jury this instruction.

The next instruction, complained of in argument, by the appellant's counsel is the seventh. This instruction contains a prefatory statement of fact, in regard to which the law is applied by the court in the remainder of the instruction. The only part of this instruction, of which complaint is here made, is this preface or prefatory statement, which reads as follows, in the transcript of the record on file in this court:

"There is a paper attached to the policy which purports to contain an acknowledgment of the execution of the ——— policy of insurance, by the defendant, Melissa C. Makepeace, before R. J. Hall, a justice of the peace; and then the court instructed the jury as to what it conceived to be the effect of such acknowledgment, as an instrument of evidence, if the jury should believe from the evidence in relation to such acknowledgment, that it was not attached to the policy at the time it was taken, and had no reference to it, but was afterward attached to the policy without the appellee's consent or knowledge."

Pence, Administrator, v. Makepeace *et al.*

It will be observed, that, in the above quotation from the seventh instruction, there is a blank or omission immediately preceding the words "policy of insurance," where they occur therein, and it is of this blank or omission in said quotation, that the appellant's counsel complain in this court. But we fail to see how, or wherein, the appellant could be possibly harmed by this blank or omission in the instruction. If the blank existed at the time the instruction was given, and the appellant believed that this blank or omission was prejudicial to his interests, he should have then asked the court to fill such blank. If the blank did not exist in fact, but simply occurred in transcribing the instruction into the record for this appeal, and the appellant believed that the omission would prevent him from properly presenting the question of the alleged error of the court, in giving the instruction, he should have applied to this court for a certiorari, and have thus procured a correct copy of the instruction. But the jury could not have been misled by this blank or omission in the instruction; for there was but one acknowledgment before R. J. Hall, a justice, attached to the policy, mentioned or referred to either in the pleadings or evidence, and that was the alleged acknowledgment by the appellee of her alleged assignment of the policy of insurance. It seems to us therefore, that this blank or omission in the seventh instruction, if it could be called an error was entirely harmless, and we have often decided that we will not reverse a judgment for a harmless error.

In the eighth instruction the court informed the jury, in substance, that they could not presume or infer that the appellee had given James T. Makepeace any authority to assign or transfer the policy to Corwin, from the fact that they were husband and wife; but that such authority must be proved by evidence. There was no error, we think, in this instruction.

The ninth instruction of the court was as follows:

Pence, Administrator, v. Makepeace *et al.*

"9. Verbal admissions or statements, consisting of mere repetitions of oral statements made some time ago, are subject to much imperfection and mistake, for the reason that the party making them may not have expressed his or her own meaning, or the witness may have misunderstood him or her, or, by not giving their exact language, may have changed the meaning of what was said; such evidence should, therefore, be received by the jury with great caution. But admissions deliberately made, and well understood, are entitled to your consideration, especially when made against a party's own interest."

The tenth instruction of the court also relates to the subject of verbal admissions and statements of a party as evidence; and the substantial difference between it and the ninth instruction, we think, is, that the general rules of evidence in regard to verbal admissions, stated in the ninth instruction, are applied by the court in the tenth instruction to the alleged verbal admissions of the appellee, and the evidence in relation thereto. We are clearly of the opinion that the law on the subject of these instructions is clearly and correctly stated and fairly applied therein. The ninth instruction is almost a literal copy of section 200 of 1 Greenleaf Evidence, which has often been approved and recognized as law in the decisions of this court. *Hill v. Newman*, 47 Ind. 187; *McMullen v. Clark*, 49 Ind. 77.

The eleventh instruction also relates to the same subject, and, like the tenth, is merely an application of the general rules of law stated in the ninth instruction to the evidence before the court and jury in this case. In our opinion the court did not err in either of these three instructions.

In the thirteenth instruction, the court stated the law on the subject of an attesting or subscribing witness, as follows:

"13. The assignment, endorsed upon the policy of insurance, introduced in evidence, appears to be attested by

Pence, Administrator, v. Makepeace et al.

Willim B. Dilts, as a subscribing witness. The testimony of a subscribing witness, in whose presence a written instrument purports to have been executed, is the best evidence of the execution of the instrument, but is not the only evidence that may be given of its execution."

The fourteenth and fifteenth instructions relate to the same subject, and are to the same effect. There can be no doubt, we think, that the instructions correctly state the law, in regard to the subject-matter thereof. *Jones v. Coopriders*, 1 Blackf. 47, and notes; *Booker v. Bowles*, 2 Blackf. 90, and notes.

Only one other question is discussed by the appellant's counsel in their argument of this cause in this court, and that is the sufficiency of the evidence to sustain the verdict. It can not be questioned, we think, but that there was evidence introduced which tended to sustain the verdict. As we have seen, the only question for trial was, whether or not the appellee had ever executed the written assignment, under which the appellant claimed title to the policy and money in suit. In her evidence, the appellee denied positively and unequivocally that she had ever executed any assignment of the policy. The attesting witness, whose name appeared at the foot of the assignment, testified that the appellee had never signed the assignment in his presence, and that he did not attest such assignment. The justice of the peace, before whom it was claimed that she had acknowledged her execution of the assignment, testified that she had never acknowledged before him the execution of the assignment of the policy. True, there was a mass of evidence introduced directly in conflict with the appellee's evidence; but it was the province of the jury to reconcile this conflicting evidence if they could, or otherwise to determine which of the witnesses were the more worthy of belief. Their conclusion on these points has resulted in a verdict for the appellee;

The City of Crawfordsville v. Barr.

and this verdict, under the settled rules of this court, we can not disturb upon the weight of the evidence.

In conclusion, we hold that the court did not err in overruling the appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

THE CITY OF CRAWFORDSVILLE v. BARR.

MECHANIC'S LIEN.—*Material Man.*—*Copy.*—*Notice of Lien.*—*Complaint.*—*Description of Premises.*—*Cases Distinguished.*—*Parties.*—In an action by a material man, against a city as the owner of real estate, to enforce a mechanic's lien for the value of materials furnished for and used in the construction of a building erected on such real estate by a contractor, the notice recited that the plaintiff had furnished the "material for the erection of the city engine building now being erected on *part* of lot number," etc., giving notice that he intended to hold a lien on said "part of said lot * and the improvements situate thereon," etc., but the complaint contained no more particular description thereof.

Held, on demurrer, that the description in the notice is sufficient, but, for want of averments rendering such description certain, the complaint is insufficient. *Bourgette v. Hubinger*, 30 Ind. 296, and *O'Halloran v. Leachey*, 39 Ind. 150, distinguished.

Held, also, on demurrer for defect of parties defendants, that the contractor, though a proper, was not a necessary, party.

SAME.—*Extent of Lien.*—A mechanic's or material man's lien attaches to the whole lot or subdivision of land upon which the building is erected, and not merely to the ground covered by it.

From the Montgomery Circuit Court.

T. H. Ristine, for appellant.

R. B. F. Peirce, for appellee.

NIBLACK, J.—This was a proceeding by Benjamin B. Barr, against the city of Crawfordsville, to enforce a lien upon a building erected by the city, for materials furnished for the building.

The cause has been before in this court. See *The City of Crawfordsville v. Barr*, 45 Ind. 258.

The complaint was in three paragraphs, but the second

The City of Crawfordsville v. Barr.

paragraph was withdrawn after a demurrer to each paragraph had been interposed and overruled, and before the cause went to trial.

A trial by the court resulted in a finding and judgment for the plaintiff, and in a decree for the sale of the building and ground on which it is situated, to satisfy the judgment.

The first error assigned is upon the overruling of the demurrer to the complaint.

The first paragraph of the complaint was as follows :

"The plaintiff, Benjamin B. Barr, complains of the defendant, The City of Crawfordsville, and says, that during the month of September, 1872, Robert Alexander and Benjamin Whitsett, doing business under the firm name and style of Alexander & Whitsett, were engaged in the construction of a certain building and engine house, on part of lot 110 on the original plat of the town (now city) of Crawfordsville, in Montgomery county, Indiana, under a contract with the defendant, who was at the time, and now is, the owner of said part of lot No. 110; that, on the 7th day of November, 1872, and on various days between that day and up to and including the 14th day of November, 1872, the plaintiff furnished, sold and delivered to said Alexander & Whitsett, contractors as aforesaid, one hundred and thirteen thousand brick, at \$7.62½ per thousand, to be used in the construction of said city building and engine house, and which said brick were used in the construction of said engine house and city building. And plaintiff says that there is yet unpaid and due him, from said Alexander & Whitsett, the sum of four hundred and sixty-one dollars, with interest thereon, being [the] amount of balance yet due this plaintiff for said brick furnished and used as aforesaid, a statement of which said account is filed herewith and made part hereof, and marked 'B.' And plaintiff further says, that afterward, to wit, on the 6th

The City of Crawfordsville v. Barr.

day of February, 1873, the said 6th day of February, 1873, being within sixty days after the completion of said city building and engine house, this plaintiff filed his written notice in the recorder's office, giving notice of his intention to hold his lien on said part of lot No. 110, and the improvements thereon, for said balance due him of four hundred and sixty-one dollars, which said notice was, on said 6th day of February, 1873, recorded in M. L. Record No. 1, page 128, a copy of which said notice, with the recorder's endorsements thereon, is filed herewith and made a part hereof, marked 'A.'

"Plaintiff therefore demands judgment for nine hundred dollars, and foreclosure of his said lien, and a sale of the premises and improvements, or so much thereof as may be necessary to pay his claim herein, and for all other proper relief."

The third paragraph of the complaint described the real estate against which it sought to have the plaintiff's lien enforced, in the same manner, and in substantially the same words, as it was described as above in the first paragraph.

The copy of the notice filed with the complaint was as follows:

"STATE OF INDIANA, MONTGOMERY COUNTY, }
"CITY OF CRAWFORDSVILLE. }

"To the Mayor and City Council of the City of Crawfordsville aforesaid, and to all others whom it may concern:

"Know ye, that I, the undersigned, having furnished material for the erection of the city engine building now being erected on part of lot number one hundred and ten (110), on the original plat of the town, now city, of Crawfordsville, to the amount of eight hundred and sixty-one dollars, with a credit on said bill of four hundred dollars, being balance due on said bill of four hundred and sixty-one dollars, I intend to hold a lien on said part of said lot 110, and the improvements sit-

The City of Crawfordsville v. Barr.

uate thereon, for the payment of my claim for material furnished from time to time to Messrs. Alexander & Whitsett, contractors for the erection of said building.

“February 6th, 1873.

B. B. BARR.”

It is insisted by the appellee, that the question of the sufficiency of the notice did not arise in this case upon the demurrer to the several paragraphs of the complaint, and the cases of *Bourgette v. Hubinger*, 30 Ind. 296, and *O'Halloran v. Leachey*, 39 Ind. 150, are cited to sustain that position.

There was, however, an obvious difference between those cases and the case in hearing. Those cases were both actions *in personam* as well as *in rem*, that is to say, the complaint in each of them alleged facts establishing a personal liability against the defendant, in addition to a claim of lien upon the real estate which was set up under the notice in each case respectively; and, as each complaint was, at all events, good as the foundation of a personal action, this court very properly held, that a demurrer would not lie, and that the only way of raising the question of the sufficiency of the notices in those cases would have been to have moved to strike out of each complaint so much as related to the alleged liens under the respective notices.

In the case at bar, the action was *in rem* simply, and the validity of the plaintiff's claim to a lien on the real estate, conceding that there was some amount due him, depended alone upon the sufficiency of the notice. The notice in this case was, we think, the foundation of the action within the meaning of section 78 of the code, and hence properly made a part of the complaint. Its sufficiency was, therefore, necessarily challenged by the demurrer. This ruling is in accordance with the precedents established by this court. *The City of Crawfordsville v. Barr*, 45 Ind. 258; *The City of Crawfordsville v. Irwin*, 46 Ind. 438.

We consider the notice in this case as substantially an equivalent one to the notice contained, and held by this court to be sufficient, in the case of *The City of Crawfordsville v. Johnson*, 51 Ind. 397, and its sufficiency can, we think, be fairly sustained upon the theory that "that is certain which can be rendered certain." But, to have made this notice operative to enforce the lien established by it, we are of the opinion that there ought to have been some averment in the complaint particularly describing the part of the lot upon which the building referred to in the notice was situated, so that the portion of the lot intended to be sold to satisfy the lien might have been described by proper metes and bounds, or by some appropriate subdivision of the lot, in the order of sale and in the subsequent proceedings.

A mechanic's or material man's lien attaches to the lot or subdivision of land upon which the building is situate, and not necessarily only to the ground covered by the building. 2 R. S. 1876, p. 266, sec. 647.

It is quite evident to us, that both the first and third paragraphs—the only ones before us—of the complaint in this case are fatally defective for want of proper averments, giving a more particular description of the part of the lot intended to be designated by the notice. Our conclusion as to the insufficiency of these paragraphs seems to us to be fully sustained by the case of *Munger v. Green*, 20 Ind. 38; also, by the case of *Halstead v. The Board of Comm'rs of Lake Co.*, 56 Ind. 363.

Defect of parties was also assigned as a ground of demurrer to the complaint, in the proceedings below, alleging that Alexander & Whitsett ought, also, to have been made parties defendants to the action.

While those gentlemen might properly have been made codefendants with the appellant, yet, as no judgment of any kind was demanded against them, they were not nec-

Hogate et al. v. Edwards.

essary parties to the action. The objection, therefore, that they were not, also, made defendants, was not well taken.

As the judgment must be reversed, for want of a sufficient complaint, it is unnecessary that we shall review the proceedings below subsequent to the overruling of the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer to the first and third paragraphs of the complaint, and for further proceedings.

HOGATE ET AL. v. EDWARDS.

CONTRACT IMPLIED.—*Services Rendered by Attorney at Request of Client's Attorney.—Ratification.—Principal and Agent.*—The attorneys of one of the parties to an action, being non-residents of the county wherein the action was pending, and having no authority from their client to employ additional counsel, telegraphed to certain resident attorneys to file a certain pleading in such cause, on behalf of the client, which they, entering their appearance for the client, did. Certain interrogatories having been filed by the opposite party, directed to such client, the resident attorneys moved to strike them out, and, on the overruling of that motion, forwarded the interrogatories to the non-resident attorneys, who caused them to be answered by the client, and then returned them to the resident attorneys to be filed. When the cause came on for trial, the latter attorneys, without being requested so to do, but with the knowledge of the client, assisted the non-resident attorneys in empanelling the jury, in taking down evidence, and in consultations regarding the defence.

Held, in an action therefor, that the resident attorneys are entitled to recover from the client for their services.

From the Boone Circuit Court.

T. W. Lockhart, E. G. Hogate and R. B. Blake, for appellants.

NIBLACK, J.—*Enoch G. Hogate and Richard B. Blake*

sued John K. Edwards in the court below for services as attorneys, alleged to have been rendered for the said Edwards.

From the pleadings and the evidence, we may summarize the facts, as they were made to appear upon the trial, as follows :

On and previous to the 7th day of June, 1875, an action was pending in the Hendricks Circuit Court, in which John N. Shirley and William N. Crabb were plaintiffs, and the said John K. Edwards and James Dugan were defendants ; that Edwards, at that time and since, resided in Boone county, where Messrs. Clements & Wills, practising attorneys, first employed by him to defend the action, also resided ; that the plaintiffs were then and since residents of Hendricks county, and were practising law in that county as partners under the firm name of Hogate & Blake ; that, on the said 7th day of June, 1875, Clements & Wills, then attorneys for Edwards, and having reference to the cause above named, telegraphed the plaintiffs as follows :

“LEBANON, IND., 6—7, 1875.

“To Hogate & Blake, Danville, Ind. :

“In fourteen hundred and three file a separate general denial for John K. Edwards. Auswer.

“CLEMENTS & WILLS.”

That, as requested, the plaintiffs appeared in the Hendricks Circuit Court and filed an answer in general denial for Edwards ; that afterward the attorneys for the plaintiffs in that action filed written interrogatories in the cause, to be answered by Edwards, and the said Hogate & Blake again appeared to the action and moved to strike out those interrogatories ; that, “failing to get them struck out, they mailed them to Mr. Clements, who was senior counsel in the cause, and he had Edwards to answer them, and then returned them, thus answered, to Hogate & Blake to be filed in court ; that, before the trial came on, Wills went out of

Hogate et al. v. Edwards.

the case, and Wesner, another practising attorney, took his place in the subsequent proceedings; that, when the cause came on for trial, Clements & Wesner and Hogate & Blake appeared and conducted the defence for Edwards, Hogate & Blake assisting in impanelling the jury; that Hogate took down the testimony and Blake was present giving attention to the case, both being present during the entire trial, lasting two days; that Edwards was also present during the entire trial, sitting with said attorneys, who were conducting his defence, and making suggestions from time to time to them, as to the management of his defence; that once during the trial Edwards was in the office of Hogate & Blake, talking generally with Clements, Hogate, and perhaps others, about the case and his defence; that nothing was said to Hogate or Blake during the progress of the cause, either by Clements or Edwards, or any one else, as to any fee or compensation which they were to or might receive for their services. As to these facts there was no conflict in the evidence.

Edwards testified, that, immediately after the trial of the cause against him and Dugan had been concluded, he inquired of Hogate about his fee, and that Hogate said Clements would settle with him. Hogate, in his testimony, denied this statement, and said that Edwards, just before he left the court-house at Danville, after the trial, remarked to him, "I will see you again;" to which he, Hogate, replied, "All right." Clements testified, that, since the trial above referred to, the plaintiffs, Hogate and Blake, had written to him two letters, which were either mislaid or lost, requesting him to settle their fee. Both Hogate and Blake, in their testimony, acknowledged that they had twice written to Clements concerning their fee, but asserted that in both those letters they requested Clements to see Edwards and induce him to pay it.

Upon this evidence, omitting here what was said as to

the value of the services sued for, and some merely incidental matters not necessary to be set out in this opinion, the court trying the cause found for the defendant, and, over a motion for a new trial, raising the question of the sufficiency of the evidence, rendered judgment for the defendant, upon the finding.

The only error assigned is upon the decision of the court in overruling the motion for a new trial.

As has been seen there was no conflict in the evidence as to the main and controlling facts in this case. The conflicting testimony was with regard to collateral questions, arising after the services were rendered for which compensation was demanded.

The question to be decided here is: Did the evidence, about which there was no conflict establish a valid claim against Edwards, for the services performed by Hogate & Blake? If it did, the judgment ought to be reversed. If not, then it must be affirmed.

The case of *Briggs v. Town of Georgia*, 10 Vermont, 68, was, in many respects, a very similar one to the one in hearing. In that case the court said: "If the attorney, who has the management of the suit, employ an assistant at the trial, and the client is present, and sees the person, thus employed, assist in managing and conducting the suit, the inference would be strong, if not irresistible, that he consented to such employment, and he would be liable for the fees of the assisting counsel."

In the case of *Brigham v. Foster*, 7 Allen, 419, which was an action for services as attorney, the court said:

"The mere fact that the plaintiff rendered professional services in favor of the defendant on the trial of a cause in which the latter was a party would not alone be sufficient to establish a legal claim for compensation therefor. Nor are we prepared to say that a retainer by the attorney of record in the suit would of itself bind the defend-

Hogate et al. v. Edwards.

ant to pay the fees of counsel who were thus retained and who rendered their services in his absence and without his knowledge. This case has other elements in it, upon which an implied promise and legal liability may properly be held to arise on the part of the defendant to make a reasonable compensation for the services rendered by the plaintiff. * * *

"The plaintiff was employed in the case through the agency of Porter, who was the attorney of record of the defendant in the suit, and who also had the management and preparation of the case for trial. The plaintiff, being thus introduced into the case, assumed the relation of counsel in the presence of the defendant, and conducted the case with his knowledge and participation, and the defendant consulted with him on the trial. This would ordinarily be quite sufficient to render the party liable for the services performed."

These cases seem to us to be well supported, both on principle and by authority, and are, we think, decisive of the case before us.

Whether Clements & Wills were authorized to employ assistant counsel or not, the conduct of Edwards upon the trial must be held to have amounted to an implied ratification of their employment of the appellants, and to have rendered him liable to the appellants for the reasonable value of their services. *Dunlap's Paley Agency*, 171; *Story Agency*, secs. 249 to 255; *Long v. Rodman*, 58 Ind. 58.

In our opinion, therefore, the court erred in overruling the appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Cunningham v. The State, *ex rel.* Zartman.

CUNNINGHAM v. THE STATE, EX REL. ZARTMAN.

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| 148 | 703 |

BASTARDY.—*Instruction as to Time Child was Begotten.*—Where, in a prosecution for bastardy, it is a question, from the evidence, as to whether or not another than the defendant was the father of the child, which was a “full grown, nine months child,” and as to whether, from the testimony of the relatrix, the defendant had had access to her within the period during which it must have been begotten, it was erroneous to instruct the jury trying the cause, that the day and month on which it was begotten were unimportant, if they found that he was its father.

SAME.—*Access Does Not Import Intercourse.*—It was also improper to instruct the jury, in relation to testimony by the relatrix that the defendant had been in her company at certain times, that such testimony tended to prove, that, at those times, he was having sexual intercourse with her.

SAME.—*Defendant's Knowledge of Relatrix's Pregnancy.*—An instruction, that the fact that the defendant was aware, and communicated to others his knowledge, of the pregnancy of the relatrix soon after the child was begotten, should be considered, was erroneous.

SAME.—*Occupation.*—*Credibility of Witness.*—An instruction, that, if the defendant was a teacher, that fact added nothing to his credibility, but in fact detracted therefrom, if he had in fact had sexual intercourse with the relatrix, was erroneous.

SAME.—*Pauper.*—*Instruction Prejudicing Jury.*—A statement, in an instruction, that the child was a bastard, and would become a charge upon the county if no father should be found for it, was improper.

SAME.—*Standing and Character of Defendant and Relatrix.*—It was improper for the court to instruct the jury, that they may consider whether the defendant, as a man of character, was likely to influence the relatrix, as a woman of a confiding nature, to consent to the sexual act.

SAME.—*Impeachment of Witness.*—*Character.*—The general moral character, but not specific acts, of a witness may be given in evidence to impeach him.

SAME.—*Instruction Reciting Evidence.*—An instruction professing to recite the testimony of a witness as it was given is erroneous.

SAME.—*Weight of Evidence.*—An instruction charging the jury as to the weight they should give to certain testimony is erroneous.

From the Miami Circuit Court.

J. L. Farrar, J. Farrar and L. Walker, for appellant.

J. S. Slick, for appellee.

BIDDLE, J.—Prosecution for bastardy, against the appellant, by the State, on the relation of Lucinda Zartman.

Cunningham v. The State, *ex rel.* Zartman.

Conviction, followed by the usual order of payments for the support of the child. Appeal.

The only assignment of error in this court is, overruling the motion for a new trial, under which various questions are reserved, among which are exceptions to certain instructions given to the jury by the court, which were as follows:

"1. The statement of the prosecuting witness is, that Thomas Cunningham is the father of the child. If it is so, the verdict should be for the plaintiff; if not, for the defendant. The simple inquiry is, Is Thomas Cunningham the father of the child? It does not make any difference whether it was begotten on Sunday, or any other day, if you find it proven at any time; nor does it make any difference if it was in April, May or June, if he was the father. The names of months and days are unimportant. The only question is, Was he the father of the child?

"2. In answer to the statement of the girl, it is claimed that there was no opportunity of access. This I understand to be his ground of defence. If, when this commerce was claimed, he was absent, he could not be the father; and I understand that the defence, as to that extent, is on the ground of impossibility of access. Upon the one side is proof by the girl, and supported in some measure by the father, that Cunningham was at her house three several times, naming them.

"3. The testimony of the girl and her father, that he was present at the times, tends to show that Cunningham was at Zartman's house, having connection with her, on three several occasions. Several witnesses put that in question in this way: It seems Cunningham went to his father's house to remain over Sunday, and for other purposes. Now, if this girl and her father are to be believed, and you can put it together and make it consist

with the testimony of Cunningham and his sons, that he went home and remained over Sunday, you should do so.

"4. For a person to say that an individual is in the neighborhood when he was with him is proper testimony, but for him to say he was in the neighborhood when he was not with him, or was with him only a part of the time, is saying something he don't know; it is not a statement of fact. If you can put these facts together, so that Cunningham could have gone and returned in these intervals, believing in the testimony of the plaintiff, so as to reconcile these statements, it is your duty so to find. If the testimony of Zartman and daughter, and of Cunningham and sons, can be reconciled, you, as a jury, should do it.

"5. There has been information given as to early knowledge of Cunningham as to the pregnancy of the girl. The rule would be this, applied every day in different cases.

"6. If a girl in the first two, three or four months of her pregnancy confides it, she is likely to tell it to a party who has a right to know it, and if he tells it you may enquire how Cunningham knew it. I don't mean to say he knew it, but, if he knew it, it is a question how he came to know it.

"7. The fact that Thomas Cunningham was a teacher of the county does not add to his credit, if you find that he had carnal intercourse with the prosecuting witness, but is greatly to his discredit. Again, if you find a teacher in the public schools holding a certificate which recommends him as a teacher of good morals, and he likewise states, as does Frank Cunningham, that he has had carnal intercourse with a woman, it properly enters in the consideration of a jury upon his confession, as a fact going to his moral character.

"8. We find here a mother without a husband, a child

Cunningham v. The State, ex rel. Zartman.

without a father, which is or may be a public charge upon the county if no father is found. It is a case which goes to the good sense of everybody, by the jury to be judge see the proofs, by rules applied to ordinary experience. The condition of the girl, her mental force and her age may be considered ; whether she is likely to be confiding and imposed upon, and what relations she bore the defendant, and whether from these to be more quickly overcome. If the person imposing is a man of character, the imposition is easier."

We may remark here, that the instructions are so irregularly numbered in the transcript, that we have renumbered them in the order in which they appear to have been given to the jury, and in the order in which they stand in the transcript.

Upon the trial the prosecuting witness, and the physician attending her delivery, testified that the child was born on the 23d day of December, 1875. The physician testified that he thought the child was a " full grown, nine months child," and gave the facts which induced his belief. This testimony was not contradicted.

There is testimony tending to prove that Samuel York had sexual connection with the prosecuting witness between the 17th and 20th of March, 1875, and testimony tending to prove that the appellant never saw the prosecuting witness until the 13th day of April, 1875, and that he never saw her again until the 6th of June, 1875. The prosecuting witness testified upon the trial, before the jury, that " the child was begotten about the 1st of April, about the middle of April, or about the 1st of May."

As applicable to the evidence before the jury, we do not think the instructions to the jury can be upheld. It was erroneous to instruct the jury what statements the prosecuting witness had made to them in her testimony, as was done in the first instruction ; that was solely for the jury to

decide; and, in view of the testimony as to the time the child was born, it was improper to instruct the jury that it was immaterial whether it was begotten in April, May, or June; for, if it was born December 23d following, and was a "full grown, nine months child," it could not have been begotten in either of those months; besides, if it had been begotten on the last day of June, by the well known period of gestation, it could not have been born alive on the 23d day of the next December, and survived.

The sentence, "Upon the one side is proof by the girl, and supported in some measure by the father, that Cunningham was at her house three several times, naming them," as stated in instruction number two, is erroneous. It directly tells the jury what proof was made by the girl, supported in some measure by her father. This was solely for the jury to decide, and not the court.

Instruction number 3 is wrong in telling the jury what the testimony of the girl and her father tended to prove; and the proposition, that, if the appellant was present at Zartman's house, that fact tended to prove that he was having connection with the girl "on three several occasions," can not be upheld as a rule of law.

The 4th instruction charges as to the weight and meaning of the testimony, and in this respect is erroneous.

We have not been able to understand the meaning of the 5th instruction, but it is clearly wrong in telling the jury that there had been information given as to early knowledge of Cunningham as to the pregnancy of the girl. If this question had any significance in the case, it was for the jury to decide, and not the court.

The 6th instruction contains merely an inference of fact uncoupled with any rule of law, and ought not to have been given.

The credibility of witnesses can not be impeached in the method pointed out in instruction number 7; their

MOORE v. THE STATE.

general moral character may be given in evidence to the jury, but not specific acts, to impeach their credibility. This rule is well settled.

The first sentence of instruction number 8 amounts to assuming that the prosecutrix has been delivered of a child, and that the child is a bastard,—two important facts for the jury to find, and not for the court to assume; and the statement, that the child might become a public charge, if no father was found for it, was well calculated to prejudice the jury against appellant. We are unable to understand the second sentence of this instruction. The remaining part of it, as to the condition of the girl, her age, her being overcome, and the character of the person who imposed upon her, might have some significance in a trial for seduction; but in a trial for bastardy, wherein it is immaterial whether the girl was willing or unwilling, or consented or was overcome, it is wholly out of place, and would be very likely to influence the jury improperly.

Other questions are made upon the admission and rejection of evidence, and upon the insufficiency of the evidence to sustain the verdict, which we do not examine, as we think the appellant is entitled to a new trial on account of the erroneous instructions given to the jury.

The judgment is reversed, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

MOORE v. THE STATE.

LIQUOR LAW.—*Sale to Minor in Good Faith.*—*Representations of Minor as to his Age.*—*Instruction Assuming Fact not Proved.*—On the trial of a defendant indicted for selling intoxicating liquor to a minor, wherein the de-

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Moore v. The State.

fence was that the sale alleged had been made by the defendant in good faith, upon the strength, and in the honest belief of the truth, of representations proved to have been made to the defendant, by the minor and others, at and before the time the sale was made, that such minor was an adult, it was error in the court, in its instructions to the jury, in the absence of evidence to that effect, to charge them that, if such representations were made after the sale charged, they could not be considered by them.

From the Henry Circuit Court.

D. W. Chambers and — *Barnard*, for appellant.

T. W. Woollen, Attorney General, for the State.

WORDEN, C. J.—This was an indictment against the appellant, for selling intoxicating liquor to George Brown, a minor.

Trial by jury, and conviction.

The principal question controverted in the cause was whether the appellant acted in good faith in selling the liquor to Brown, believing him to be an adult.

The court gave to the jury the following, among other, charges, viz. :

"3. If the defendant sold the intoxicating liquor, as charged, to George Brown, who was in fact then under twenty-one years of age, but if the defendant, when he so made such sale, believed that said George Brown was twenty-one years of age, and acting in good faith upon such belief, and in the exercise of reasonable caution, made the sale, he must be acquitted." So much of the charge was given at the instance of the defendant, but the court appended thereto the following: "Testimony has been given concerning statements said to have been made by George Brown to the defendant, concerning his age. It is for the jury to determine, from all the evidence, whether or not such statements were in fact made; and, if made, whether or not they were made at the time, or before or after the sale testified to by the prosecuting witness. If they were made afterward, then they can not be considered for the purpose of showing good faith

or diligence on the part of the defendant, for the plain reason that he could not have made the sale upon the faith of representations made after the sale."

The matter thus added by the court was, doubtless, logically correct, and legally so, if applicable to the case made by the evidence. It assumes that there was evidence tending to show, or from which it might be inferred, that some or all of the supposed statements made by Brown to the defendant, as to his age, if they were made at all, were made after the sale of the liquor for which the defendant was on trial. We have examined the evidence carefully, and find nothing in it which justifies such assumption. There is no evidence in the record that in any way tends to show, that any of the statements made by Brown to the defendant, as to his age, were made after the sale of the liquor in question. On the contrary, the evidence affirmatively shows, that all such statements, attempted to be proved, were made at or before that time. George Brown testified as a witness, and fixed the time at which he bought the liquor in question, as in October, 1878. Brown, it may be remarked, was twenty years old in the June previous.

James Smith testified, that he was acquainted with George Brown, and had seen him in the defendant's saloon; that Brown called for a drink, and the defendant asked him if he was of age, and he replied that he was. The defendant then asked the witness if Brown was twenty-one, and the witness said he thought he was; that he was big enough. Brown said that he was willing to swear that he was of age. This was between the first and the middle of September.

John Sweigart testified, that he "heard George Brown make representations, about billiard saloon, as to his age. It was in September. Mr. Moore said, 'George, are you twenty-one?' He said, 'I am.'"

The evidence was not varied upon cross-examination.

Derixson v. The State.

This is all the evidence there was of statements made by Brown to the defendant as to his age; and, if made, they were clearly made before the sale of the liquor in question.

The charge, therefore, was inapplicable to the case made by the evidence, and should not have been given.

Upon the authority of the case of *McMahon v. Flanders*, 64 Ind. 334, and the cases therein cited, and for the reasons therein given, we must hold that the portion of the charge thus added by the court was erroneous, as applied to the case made by the evidence.

The judgment below is reversed, and the cause remanded for a new trial.

DERIXSON v. THE STATE.

CRIMINAL LAW.—*Trespass upon Lands.—Cutting Trees.—License.—Landlord and Tenant.*—A tenant in possession, merely as such, has no implied license to cut down trees growing upon his leasehold; and his "good intention and honest belief" in cutting the trees afford him no defence.

From the Vigo Circuit Court.

— *Eggleston* and — *Reed*, for appellant.

T. W. Woollen, Attorney General, *A. J. Kelly*, Prosecuting Attorney, and *S. C. Davis*, for the State.

Howk, J.—The indictment in this case charged that the appellant, Job Derixson, late of Vigo county, on the 8th day of October, 1878, at said county, "did then and there unlawfully cut down, on land belonging to one John J. Brake, in said county, two green ash trees, and eight green oak trees, of the value of forty dollars, and of the property of said John J. Brake, without having a license so to do from

Derixson v. The State.

said John J. Brake, or any other competent authority ; contrary to the form of the statute," etc.

The appellant's motion to quash the indictment was overruled by the court, and to this ruling he excepted. Upon arraignment, his plea to the indictment was, that he was not guilty as therein charged. The cause, by consent, was tried by the court without a jury, and a finding was made that he was guilty as charged, and assessing his punishment at a fine in the sum of sixty-five dollars. The appellant's motion for a new trial was overruled by the court, and his exception was entered to this decision, and judgment was then rendered upon and in accordance with the finding of the court.

The appellant has assigned in this court the following decisions of the circuit court, as errors :

1. In overruling his motion to quash the indictment; and,
2. In overruling his motion for a new trial.

The first of these alleged errors is not even alluded to by the appellant's counsel in their argument of this cause, in this court. This alleged error, even if it existed, might properly be regarded as waived. We see no objection to the indictment, and none has been pointed out to us, and therefore we conclude that the motion to quash was correctly overruled.

In his motion for a new trial the appellant assigned, as causes therefor, that the finding of the court was contrary to the law and to the evidence, and that it was not sustained by the evidence.

The misdemeanor for which the appellant was indicted in this case is defined, and the punishment therefor prescribed, in section 14 of the misdemeanor act of June 14th, 1852, as amended by an act approved March 4th, 1861, Acts 1861, Reg. Sess., p. 145. We set out so much of the amended section 14 as is applicable to the case at bar, as follows:

Derixson v. The State.

"SEC. 14. Every person who shall injure any tree or sapling on the land of any other person, * * * without a license so to do from competent authority, or who without such license shall cut down or remove from any such lands * * * any tree, stone, timber, or other valuable article, shall be deemed guilty of a trespass, and upon conviction shall be fined in five times the value of such property, to which may be added imprisonment not exceeding twelve months in the county jail, in the discretion of the court or jury trying the same;" etc. 2 R. S. 1876, p. 463.

It is claimed by the appellant's counsel, as we understand their argument, that the evidence adduced upon the trial was not sufficient in law to sustain the finding of the court. The evidence is properly in the record. It shows very clearly, that the appellant cut down the trees charged in the indictment, on the land of John J. Brake, in Vigo county, and that he cut down said trees without license from Brake, or from any competent authority, unless such license might be implied from the fact that he was the tenant of Brake, in possession of said land, at the time he cut the trees. We think it is certain that no such implication could arise merely from the fact of such existing tenancy. A tenant, as such, has no right, without express authority or license, to cut trees upon the land of his landlord except, perhaps, for necessary fire-wood, and such authority or license can not be implied from the mere possession, or right of possession, of the land by the tenant.

The lease under which the appellant held possession of the land on which he cut the trees in question was in writing and was in evidence. We need not set out this lease, in this opinion, but we may properly say that it gave the appellant no authority or license to cut down any trees on the demised premises. From the terms of the lease, it seems to us, that, although it covered the entire body of land described therein, yet the rights of the appellant, as

Derixson v. The State.

tenant, were limited, impliedly at least, to that portion of the land which was tillable and under cultivation.

It is insisted by the appellant's counsel, with much zeal and earnestness, that the crime of trespass, created and defined in and by section 14, above quoted, of the misdemeanor act, "is a crime against possession." Upon this proposition the argument of counsel is, that, as the appellant was in possession, and had the right of possession, of the land upon which he cut down the trees, he could not be guilty of the crime of trespass, as defined in said section 14, in cutting down said trees. The argument of counsel is unsound, because, as it seems to us, section 14 of the misdemeanor act is not open to any such construction as counsel seek to give it. Indeed, we think that the legislative intent and purpose, in the enactment of section 14 as amended, were to protect the rights of the owner of the land in fee from unlawful invasion, and therefore it was made a crime punishable by a heavy fine, to which imprisonment in the county jail might be added, for any person to cut any tree on the land of any other person without a license so to do from competent authority. The acts of the appellant in cutting down the trees on Brake's land, without license so to do from competent authority, were unlawful acts within the purview of section 14, above quoted, of the misdemeanor act; and the "good intention and honest belief" of the appellant afford him no defence in this case, without the necessary license.

We are clearly of the opinion that the evidence in the record was sufficient in law to sustain the finding of the court, and, therefore, that the appellant's motion for a new trial was correctly overruled.

The judgment is affirmed, at the appellant's costs.

The State v. Rudowskey *et al.*

THE STATE v. RUDOWSKEY ET AL.

SURETY OF PEACE.—*Recognizance to Answer.*—*Complaint for Breach by Assault on Third Person.*—In an action by the State, against the principal and surety, on a recognizance, the complaint alleged that the "prosecuting attorney * now gives the court here to understand and be informed," that, on, etc., at, etc., in a proceeding for surety of the peace, instituted against the principal, in the name of the State on the relation of an affiant, before a justice of the peace, the principal had been required to and did enter into a recognizance, made part of the complaint by copy, with his codefendant as surety, in a certain sum each, to the State, to appear on the first day of the next term of the circuit court to answer in such cause, "and abide the order of such court therein, and in the mean time keep the peace toward all inhabitants of this State;" and that thereafter, but prior to the first day of such term of court, the principal had committed an assault and battery upon a certain third person, and had been prosecuted, and on his own confession convicted therefor. Wherefore, etc.

Held, on separate demurrers by the principal and surety, that the complaint, though informal, is sufficient.

From the Marshall Circuit Court.

T. W. Woollen, Attorney General, *P. O. Jones*, Prosecuting Attorney, and *J. D. McLaren*, for the State.

M. A. O. Packard and *O. M. Packard*, for appellees.

NIBLACK, J.—This was an action by the State, against Robert C. Rudowskey and John Weiseter, on a recognizance to keep the peace.

The complaint was as follows:

"Perry O. Jones, prosecuting attorney, in and for the Forty-First Judicial Circuit of the State of Indiana, * * * now gives the court here to understand and be informed, that, on the 9th day of August, 1878, an affidavit for surety of the peace was made and filed by one Peter Becker, against the said defendant Rudowskey, before D. A. Snyder, Esq., a justice of the peace in and for said [Marshall] county, and thereupon a warrant was issued by said justice, and the said Rudowskey was arrested thereupon, and taken before said justice, and then and there

The State v. Rudowskey et al.

and thereupon the said Rudowskey, in open court, before said justice Snyder, confessed that the said Peter Becker had just cause to entertain the fears expressed in his said affidavit for surety of the peace aforesaid, and the said justice so found accordingly, and required of the said Rudowskey recognizance and freehold security in the sum of two hundred dollars for his appearance on the first day of the next term of the Marshall Circuit Court, and in the mean time keep the peace toward all the inhabitants of this State; and thereupon the said Rudowskey and the said defendant John Weiseter, as such freehold security, executed said recognizance, a copy of which is herewith filed, marked 'A,' and made a part of this complaint.

"That afterward and before the" (then) "first day of the Marshall Circuit [Court], to wit, on or about the 5th day of September, 1878, at said county of Marshall, the said defendant Rudowskey committed an assault and battery on the person of one Charles Cressner, an inhabitant and a citizen of said county and State, of which he was convicted, and adjudged guilty upon his own confession, in open court, before the same justice of the peace, the said D. A. Snyder, justice as aforesaid, on the 11th day of September, 1878, as appears by the docket and entries therein of said justice Snyder, whereby his said recognizance, heretofore given in the surety of the peace case aforesaid, became and is forfeited to the plaintiff, the said State of Indiana aforesaid.

"And thereupon the said plaintiff demands judgment of forfeiture of said recognizance, and that the said plaintiff have judgment thereon, against the said defendants, for four hundred dollars, for the use and benefit of the school fund of said State, and for all other proper relief."

The copy of the recognizance filed with the complaint was as follows:

"In the court of D. A. Snyder, Esq., Justice of the peace in Centre Township, Marshall county, Indiana.

The State v. Rudowskey *et al.*

"The State of Indiana, *ex rel.* Peter Becker, v. Robert Rudowskey.

"We, Robert Rudowskey and John Weiseter, severally acknowledge ourselves bound to the State of Indiana in the penal sum of two hundred dollars each, if the said Robert Rudowskey shall not appear at the first day of the next term of the Marshall Circuit Court, to answer a complaint of surety of the peace, made against him by Peter Becker, and abide the order of such court therein, and in the mean time keep the peace toward all the inhabitants of this State.

R. C. RUDOWSKEY, [SEAL.]

"JOHN WEISETER, [SEAL.]

"Attest: D. A. SNYDER, J. P."

The defendants demurred separately to the complaint, and their demurrers were severally sustained. The plaintiff declining to plead further, final judgment upon demurrer was rendered in favor of the defendants.

We have, therefore, only to consider the question of the sufficiency of the complaint.

The condition of the recognizance in suit was threefold: 1st. That Rudowskey should appear in the Marshall Circuit Court on the first day of the term then next ensuing; 2d. That he should, after appearing, abide the order of said court in the proceeding in which he was so recognized; 3d. That he should, in the mean time, keep the peace toward all the inhabitants of this State.

It is only as a bond to keep the peace that we have to consider the recognizance in this action.

American authorities, having any reference to actions upon recognizances to keep the peace, are very meagre indeed, and, as proceedings to obtain surety of the peace had their origin in the common law and in the English statutes, we are required to look to English authors for the elementary definition of the nature and character of those proceedings.

The State v. Rudowskey *et al.*

Blackstone, in his commentaries, vol. 4, p. 252, in speaking of sureties to keep the peace, and for good behavior, says:

“This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the Crown in the sum required, (for instance 100*l.*) with condition to be void and of none effect if the party shall appear in court on such a day, and in the mean time shall keep the peace, either generally towards the king and all his liege people, or particularly, also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well (or be of good behavior), either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute * * *; and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehavior in the other, the recognizance becomes forfeited or absolute; and being *estreated* or extracted (taken out from among the other records), and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.”

Further on, while speaking only of a recognizance for surety of the peace, the same author says:

“Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance; or if the recognizance be general, by any unlawful action whatsoever, that either is or tended to a breach of the peace,” etc. 4 Bl. Com. 255.

The State, *ex rel.* Julian, *v.* Adams.

1 Hawk. P. C. 488; *Key v. The Commonwealth*, 3 Bibb, 495.

We have no brief from the appellees, and hence no objection to the sufficiency of the complaint has either been presented or argued here.

Applying the principles above laid down to the complaint before us, and judging also, of it, from analogous cases arising upon other recognizances, we are of the opinion, that it contains facts substantially sufficient to constitute a cause of action against the appellees, and that the demurrers to it below ought to have been overruled. *Adams v. The State*, 48 Ind. 212; *Patterson v. The State*, 12 Ind. 86.

The complaint was somewhat informal, being more in the form of an information, but that was no objection to the substantial facts which it contained. The judgment will therefore have to be reversed.

The judgment is reversed, with costs, and the cause remanded with instructions to overrule the demurrers to the complaint, and for further proceedings.

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THE STATE, EX REL. JULIAN, *v.* ADAMS.

CONTESTED ELECTION.—*Information.*—*Parties.*—*Jurisdiction.*— Under sections 749 and 750, 2 R. S. 1876, pp. 298 and 299, the right to an office may be contested by an information filed in the circuit court, in the name of the State, on the relation of the contestor, against the contestee.

SAME.—*Ballots.*—*Names showing through Paper.*— The fact, that the ballots cast for the candidate of a particular political party for a certain office are so printed on the inside, that lawful names and designations printed thereon can be seen through the paper does not render such ballots illegal.

From the Hendricks Circuit Court.

The State, *ex rel.* Julian, v. Adams.

S. H. Buskirk, R. Hill, J. W. Nichol and J. F. Julian,
for appellant.

C. Byfield and L. Howland, for appellee.

BIDDLE, J.—The information of the relator in this case states that the counties of Marion and Hendricks constitute the Nineteenth Judicial Circuit; that an election was held therein, on Tuesday, October 8th, 1878, for the purpose of electing, among other officers, a judge of the circuit; that the relator and the appellee were opposing candidates for said office; that, in the county of Marion, the relator received, at said election, 10,504 votes for said office, and the appellee received 10,581 votes for said office; that, in the county of Hendricks, the relator received 2,347 votes for said office, and the appellee received 2,318 votes for said office; that the returns of said votes were duly certified and transmitted to the Secretary of State; that the Secretary of State, in the presence of the Governor, estimated the number of votes given for the relator and the appellee for said office, and certified to the Governor that the appellee had received 48 more votes for said office than had been received by the relator; whereupon the Governor issued a commission to the appellee for said office; that the relator is a qualified elector of the county of Marion, and is entitled to said office for the following reasons:

“ That the said Joshua G. Adams was the candidate of the Republican party, in the counties composing said judicial circuit, for the said office, and his name was printed on the Republican ticket, which was printed, and furnished at the various polls for the use of such persons as desired to vote the said ticket; that the said ticket was printed on very white, thin, and hard paper, which rendered it quite transparent; that, at the head of said ticket, the words ‘Republican Ticket’ were printed in with very peculiar and unusual type, and in unusual form, and with very black ink, and, by reason thereof, the words ‘Republican Ticket’ were

The State, ex rel. Julian, v. Adams.

readily seen and easily read and understood by an inspection of the other side of the ticket; that, in the ordinary way of folding the said ticket, the words 'Republican Ticket,' so printed as aforesaid, were exposed in such manner that the officers of the election, or any other person who might be present and desire to know the ticket which any elector was about to vote, could readily ascertain and know whether a person was voting the Republican, Democratic or National ticket; that the tickets used by the Democratic and National parties at said election were printed on soft white paper, and while they had at their heads 'Democratic Ticket,' and 'National Ticket,' such words were so printed that they created no external mark or designation; that the words 'Republican Ticket,' printed on the head of the tickets which were generally cast and voted for the said Joshua G. Adams, were so printed as to constitute an external distinguishing mark which enabled persons, at a distance of several feet, to ascertain the party or person for whom the electors holding such tickets were voting; that five thousand of the ballots that were cast, given, received and counted for the defendant were printed in the manner herein set out, and were so folded that the inspectors of elections of said election could have known, and actually did know, that the persons who were voting the same were voting the Republican ticket, and with such knowledge, in violation of law, received and counted the same for defendant, and by reason thereof said tickets were in violation of the election law of said State, in force at the time of said election, and were illegal, and such votes ought not to have been received, counted and estimated for the said Joshua G. Adams at said election, the same ballots having thus been devised, printed and circulated by the Republican party for the fraudulent purpose of deceiving, intimidating and controlling the votes of the people, and of preventing them from freely

The State, ex rel. Julian, v. Adams.

exercising the right to vote as they pleased ; and the relator avers that such was the effect."

The information also alleges, that certain irregularities took place at said election in Franklin township, in Hendricks county ; but as these are not insisted upon by the relator, or rather are waived in his brief, we do not extend this opinion by their statement herein.

Prayer for process, answer, damages and general relief.

The appellee demurred to the information, stating the following grounds of demurrer ;

1. That the court has no original jurisdiction of the subject-matter of this suit ;

2. Because the complaint does not state facts sufficient to constitute a cause of action.

The court sustained the demurrer ; the appellant refused to amend, excepted and appealed. Judgment for appellee.

The appellee insists that the court had no original jurisdiction over the subject-matter of the suit by information for a writ of mandate, because the relator has an adequate legal remedy under the act for contesting elections. 1 R. S. 1876, p. 448.

The code enacts, that, "When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or any franchise within this State, or any office in any corporation created by the authority of this State," an information may be filed against any person or corporation by the prosecuting attorney, "or by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation, which is the subject of the information." 2 R. S. 1876, pp. 298 and 299, secs. 749 and 750.

It is clear, we think, that the relator may seek the remedy he asks under this statute ; and, while it is also clear, as a general principle, that a party is not entitled to a writ of a mandate when he has any other adequate legal

The State, *ex rel.* Julian, v. Adams.

remedy; yet, where the statute expressly gives the right by information, we do not think another statute giving another adequate legal remedy will take away the right given by information. At least, whatever may be the reasoning, the question must be considered as settled in this State. This court has frequently held that the right to an office may be contested by an information, during the time the statute for contesting elections was in force. *Barkwell v. The State*, 4 Ind. 179; *Huddleston v. Pearson*, 6 Ind. 337; *Yonkey v. The State*, 27 Ind. 236; *The City of Madison v. Korbly*, 32 Ind. 74; *Gass v. The State*, 34 Ind. 425; *The Board of Commissioners of Boone County v. The State, ex rel.*, 61 Ind. 379; *Reynolds v. The State, ex rel.*, 61 Ind. 392.

The remaining question is, whether the facts alleged in the information are sufficient to show that the relator is entitled to the office he claims.

The section of the statute which the relator claims under, as vitiating the ballots cast for his opponent, reads as follows:

“Sec. 23. That all ballots which may be cast at any election hereafter held in this State shall be written or printed on plain white paper, without any distinguishing marks or other embellishment thereon except the names of the candidates and the office for which they are voted for, and inspectors of elections shall refuse all ballots offered of any other description: *Provided*, Nothing herein shall disqualify the voter from writing his own name on the back thereof.” 1 R. S. 1876, p. 439.

Under this section, it has been held by this court, that writing or printing upon the face, or upon the inside of the ballot, the following words: “Union City Ticket,” or “Republican Ticket,” or “Republican County Ticket,” or “Republican Township Ticket,” is not in violation of the law, and does not authorize the rejection of the ballot. *Dru-*

Allen *et al.* v. Marney.

linier v. The State, 29 Ind. 308; *Stanley v. Manly*, 35 Ind. 275; *Millholland v. Bryant*, 39 Ind. 363.

The only distinction between the "distinguishing marks" upon the ballots which were held good under the above decisions, and those which we are now considering, is, that, in the present case, the printing on the inside of the ballots could be seen upon the outside, through the paper; while, in the former cases, it does not appear whether the printing upon the inside of the ballots could have been so seen or not. To push the meaning of the statute to the extreme of holding that the inspectors of elections shall refuse to receive ballots because the printing upon the inside, which is not unlawful, can be seen on the outside through the paper, we think would be a most unwarrantable construction of its language. The irregularity or malconduct in the inspectors in receiving such ballots can not affect the case if the votes cast thereby are otherwise legal, for it is enacted, that "No irregularity or malconduct of any member or officer of a board of judges or canvassers, shall set aside the election of any person, unless such irregularity or malconduct was such as to cause the contestee to be declared elected, when he had not received the highest number of legal votes." * * * Sec. 15, 1 R. S. 1876, p. 450. See also, *Dobyns v. Weadon*, 50 Ind. 298; *Allen v. Crow*, 48 Ind. 301; *Hadley v. Gutridge*, 58 Ind. 302.

Upon the face of the information it appears that the appellee received a majority of 48 votes over the relator, and nothing appears which shows that any of the votes cast for the appellee were illegal.

The judgment is affirmed, at the costs of the relator.

ALLEN ET AL. v. MARNEY.

PRINCIPAL AND SURETY.—*Appeal Bond.*—*Principal and Agent.*—*Notice.*—
Where, to procure an appeal from a judgment rendered by the mayor of a

Allen et al. v. Marney.

city, the surety on the appeal bond entrusts the bond to the principal, the party appealing, for delivery, the principal becomes the agent of the surety; and the mayor, in accepting and approving the bond, becomes the agent of the opposite party to the judgment; and notice to the mayor is notice to such party of any defect or illegality in the delivery of the bond.

SAME.—Bond Signed by Part only of Several Apparent Sureties.—Erasure.—

Where, in such case, a surety signs the bond, and entrusts it to the principal for delivery to the mayor only upon its being also signed by another whose name appears in the body of the bond as a co-surety, its delivery by the principal, without the knowledge or consent of the surety and without the signature of such co-surety, and its acceptance and approval by the mayor, do not render the surety liable. And the fact that the principal had erased the name of such surety before delivering the bond to the mayor does not alter this rule.

From the Knox Circuit Court.

J. M. Boyle, C. M. Allen and H. S. Cauthorn, for appellants.

W. H. De Wolf and S. N. Chambers, for appellee.

WORDEN, C. J.—The appellee, Jane E. Marney, recovered a judgment before W. H. Beeson, Mayor of the City of Vincennes, against James S. Pritchett, for the recovery of certain real estate held over by Pritchett as tenant to Marney. Pritchett appealed to the circuit court, where Marney again recovered against him.

This action was brought by Marney, against Pritchett, Allen and Cauthorn, upon the supposed appeal bond given upon the above mentioned appeal.

Allen and Cauthorn put in issue the execution of the bond by them respectively, by pleading duly verified. The cause was tried by the court, resulting in a finding and judgment for the plaintiff, a new trial applied for by Allen and Cauthorn having been denied.

Allen and Cauthorn alone appeal, Pritchett having declined to join therein.

The facts in relation to the execution of the bond by the appellants appear to have been as follows:

At the time the bond was signed by Allen, the name of Thomas R. Cobb was written in the body thereof as a co-

Allen et al. v. Marney.

obligor, and Allen signed it and left it with Pritchett, with the agreement and understanding that it was not to be delivered to the mayor, or used, until it should be signed by Cauthorn and Cobb.

So, when Cauthorn signed the bond, the name of Cobb was written therein as a co-obligor, as above stated; and Cauthorn signed it and left it with Pritchett with the like agreement and understanding that it was not to be delivered until it should be signed by Cobb. ●

The bond, signed only by Allen and Cauthorn as sureties, was afterward, without their knowledge or consent, delivered by Pritchett to the mayor, with Cobb's name erased, and was approved by him. The mayor had no notice of the condition upon which the appellants had signed the bond, other than the fact that Cobb's name had been written in the body thereof as a co-obligor, and had been erased.

We are of opinion, that, upon these facts, the action can not be maintained, that there has been no valid delivery of the bond, so far as the appellants are concerned, and therefore that it is not their deed.

In the discharge of the duty of approving and accepting the bond, the mayor acted for, and stood in the place of, the obligee; and notice to the mayor of any matter affecting the validity of the bond was as effectual as notice to an obligee when receiving and accepting an instrument on his own behalf. *Covert v. Shirk*, 58 Ind. 264.

If the name of Cobb had not been in the bond as a co-obligor, the facts being otherwise as above stated, the appellants would have been bound by the delivery thus made by Pritchett to the mayor.

Pritchett must be regarded as having been the agent of the appellants for the delivery of the bond, and his delivery would be good, though made contrary to the agreement between him and the appellants, and though he transcended his authority in thus making the delivery,

Allen *et al.* v. Marney.

if there was nothing on the face of the bond, or otherwise, to indicate that others were to sign it. In such case, the mayor having accepted the bond on the faith of appearances, and without any notice that Pritchett was not authorized to deliver it in its present shape, the appellants would be estopped to question the validity of the delivery thus made. The case of *Dearsdorff v. Foresman*, 24 Ind. 481, may be regarded as a leading case upon this subject, where the authorities are extensively considered. Many cases have followed that above cited, among which may be mentioned *Webb v. Baird*, 27 Ind. 368; *The State, ex rel., v. Pepper*, 31 Ind. 76; *Spiller v. James*, 32 Ind. 202; *The Wild Cat Branch v. Ball*, 45 Ind. 213; *Hunt v. The State, ex rel.*, 53 Ind. 321.

But the law is entirely different. where, as in the cause under consideration, a surety signs the bond, which is to be delivered only upon being signed by another whose name appears in the bond as a co-obligor.

If delivered without being signed by the other whose name thus appears, without the consent of the one who has signed, the delivery is a nullity, and the latter is not bound.

This doctrine is very clearly recognized in the case of *Dearsdorff v. Foresman*, *supra*, and in some of the cases that follow it. We are not aware that in any of them a contrary doctrine is found. In that case the court, in speaking of the case of *Pawling v. The United States*, 4 Cranch, 219, said :

“Here the representative of the government had notice, on the face of the instrument, that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors. To have held this delivery of the instrument obligatory upon the parties, when the writing itself proved the execution

Allen et al. v. Marney.

to be incomplete, would have been in contradiction of its express terms."

So, also, in speaking of the case of *Fletcher v. Austin*, 11 Vermont, 447, the court said :

"The case cited from 11 Verm. was where the names of seven sureties appeared upon the face of the bond, and only two of the sureties ever executed the same. The instrument was plainly incomplete until executed by all those whose names appeared as parties."

In that case the court also quoted, with approbation, a note by Judge REDFIELD, which we reproduce, somewhat extended, from 3 Am. Law Reg., n. s. 402, as expressive of our views of the law applicable to the case before us :

"That one who signs a bond, as surety, upon the assurance of his principal that he shall also have other responsible co-sureties which are never procured, and the bond nevertheless delivered, is deceived and defrauded, of his indemnity, no one can question. But whether he shall himself bear the loss, or visit it upon the obligee, is quite a different question. And it seems to us, upon principle, that where there is nothing upon the face of the paper, indicating that other co-sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault can not be said to rest, to any extent, upon the obligee.

"And, on the other hand, where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument, in order to give it full validity against all the parties, he makes such principal his agent, to deliver the same to the

obligee, because such is the natural and ordinary course of conducting such transactions. And if the principal, under such circumstances, gives any assurance to the surety, in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, the surety giving confidence to such assurances must stand the hazard of their performance, and can not implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.

"It seems to have been held in a majority of the American cases, that, in order to put the obligee upon inquiry even, some indication upon the face of the paper, such as the insertion of other names in the body of the bond, or some memorandum attached to the signature of the surety, indicating the condition upon which he signed, should exist, or else some notice *in pais* to the obligee, which might fairly be regarded as equivalent. And that without this the obligee is not chargeable with any positive default; and if there has been default on the part of the obligor, the bond may be enforced."

In the case of *Sharp v. The United States*, 4 Watts, 21, the names of William Laughlin and Alexander Sharp appeared upon the face of the bond as sureties and co-obligors. Sharp had signed the bond, and it had been delivered without the signature of William Laughlin. The court held the bond void as to Sharp, though there was no express understanding, that it was not to be delivered without the signature of William Laughlin. The court said, among other things:

"His" (Sharp's) "signature is conditional, and unless it be shown that the condition, viz, the execution of the bond by William Laughlin, whose name was in the body of it, has been dispensed with by him, he has a good defence to the suit. A man may be willing to bind himself jointly

The State v. Mainey.

with another, and still unwilling to make himself alone responsible. We can not agree with the court of common pleas that there is nothing justifying the construction from the face of the bond, in the absence of any other proof, that it is void as to the present defendant."

The above case, from Watts, goes further than we need to in the case before us, for here it was shown that it was expressly understood, in respect to both the appellants, that the bond was not to be delivered until signed by Cobb. See, also, the case of *The Wild Cat Branch v. Ball*, *supra*, as bearing upon this point.

We regard as of no particular importance the fact that the name of Cobb had been erased from the bond at the time it was presented to the mayor for his acceptance. For the purposes of the question involved, the case stands in substantially the same condition as if the name had not been erased. The fact that the name had been placed in the bond was sufficient to indicate to the mayor that it was expected at the time it was placed there, that Cobb would sign the bond. The name having been placed there, and being erased, was quite enough to put a prudent man upon his guard and induce enquiry as to the circumstances of the erasure, and whether the appellants had not signed the bond with the expectation and understanding that it was to be signed by Cobb also before delivery.

The judgment below, as to the appellants, is reversed, with costs, and the cause remanded for a new trial

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THE STATE v. MAINEY.

CRIMINAL LAW.—Obstructing Public Street of Town.—Board of Trustees.—Supervisor.—Repeal of Statute.—Evidence.—On the trial of a prosecution

The State v. Mainey.

for obstructing a public street of an incorporated town lying within the limits of a certain road district, the defendant proved, over objection by the State, that the acts constituting the obstruction complained of had been committed by him in repairing such street as a public highway of such road district, of which he was supervisor.

Held, that the evidence was erroneous.

Held, also, that, under section 1 of the act of April 27th, 1869, 1 R. S. 1876, p. 890, the board of trustees of such town had exclusive power over its streets, and therefore that the acts of the defendant were unlawful.

Held, also, that such act impliedly repeals section 47 of the act of June 11th, 1852, 1 R. S. 1876, p. 884, so far as they conflict as to the control of the streets and highways of a town.

From the Dearborn Circuit Court.

T. W. Woollen, Attorney General, *R. L. Davis*, Prosecuting Attorney, *A. Williams* and *J. Schwartz*, for the State.

Howk, J.—This was a prosecution against the appellee, by affidavit and information, wherein it was charged, in substance, that, on the 22d day of June, 1878, in Dearborn county, Indiana, the appellee, "Edward Mainey, did then and there unlawfully interfere with, obstruct and cause to be obstructed and interfered with, a certain highway, known as George street, between Broadway and Franklin streets, in the town of Cochran, in the county and State aforesaid, by then and there unlawfully entering upon, and being and remaining in and upon said George street, with horses, plows, picks and shovels, and by then and there unlawfully plowing, digging and removing the soil of said George street, between the said Broadway and Franklin streets."

Upon arraignment, the appellee's plea to the information was, that he was not guilty as therein charged. The issues joined were tried by a jury, and a verdict was returned for the appellee, upon which judgment was rendered for his discharge.

During the progress of the trial in the court below, the prosecuting attorney excepted to a number of the rul-

The State v. Mainey.

ings or decisions of the court, and reserved the points of law for the decision of this court. These rulings or decisions of the court have reference chiefly to alleged errors of the court in the admission of evidence; and the decisions complained of have been assigned as errors, upon the record, in this court. We need not set out these alleged errors, but we may say that they fairly present the points of law reserved by the prosecuting attorney for the decision of this court.

As necessary to a proper understanding of the questions reserved, and of our decision thereof, we will first give a brief summary of the facts of the case, as we gather them from the record.

The town of Cochran, mentioned in the indictment, was, and for a number of years prior to June 22d, 1878, had been, an incorporated town under the general law of this State, providing for the incorporation of towns. George street, mentioned in the information, was a public street or highway, within the corporate limits of the town of Cochran. The town was within the territorial limits of Centre township, in Dearborn county, and constituted Road District No. 5, in said township. At the April election, 1878, in said Centre township, the appellee Edward Mainey was duly elected supervisor of said Road District No. 5 for the ensuing two years, received a proper certificate of his election, and, on the 6th day of April, 1878, was duly qualified as such supervisor. Under the order and direction of the trustee of Centre township, the appellee, as such supervisor, on the 22d day of June, 1878, after he had been notified by the trustees of the town of Cochran that the town alone had authority over George street and he had none, and that he must desist from work on said street, did and performed the acts wherewith he is charged in the affidavit and information in this case, in work on said street as a public highway within his road district.

It will be seen from this statement of the facts of this case, that it had its origin, perhaps, in a conflict of authority between the trustee of Centre township and the supervisor of road district No. 5, on the one hand, and the trustees and other officers of the incorporated town of Cochran, on the other hand, over the public streets or highways within the limits of said town. One of the questions reserved by the State, in this case, may be thus stated: Had the appellee, as the supervisor of road district No. 5, composed, as we have seen, of the town of Cochran, any power or authority over the streets or highways within the corporate limits of said town? It seems to us that this question must be answered in the negative. In section 1 of "An act to enable incorporated towns to lay out, open, grade, and improve streets and alleys," etc., approved April 27th, 1869, it is provided, "That the board of trustees of incorporated towns of this State shall have exclusive power over the streets, alleys, highways and bridges, within the corporate limits of such town," etc. This exclusive power, in the trustees of the town, would certainly prevent any township officer, such as supervisor of highways, from having or exercising any power or authority over the streets or highways within the town limits. 1 R. S. 1876, p. 890. We have no brief from the appellee in this court, but we learn from the brief of the prosecuting attorney, that, in the court below, the appellee attempted to justify his acts, as supervisor, on George street, and claimed that he had the power and authority to do those acts, within the corporate limits of the town of Cochran, under and by virtue of the provisions of section 47 of "An act for the incorporation of towns," etc., approved June 11th, 1852. This section 47 provides, that "Nothing contained in this act shall exempt the inhabitants of any town from the payment of highway taxes legally assessed, nor from the formation of one or more

The State v. Mainey.

road districts, irrespective of the corporate limits of such town." 1 R. S. 1876, p. 884. If, however, it might be said that the incorporated town of Cochran properly constituted road district No. 5 in Centre township, under the provisions of the section quoted, it is very clear, we think, that the supervisor of that road district, since the act of April 27th, 1869, became a law, would have no power and authority over the streets and highways within his road district. In so far as the act of April 27th, 1869, is in conflict with section 47 of the act of June 11th, 1852, of course the older law must be regarded as virtually repealed by the later expression of the legislative will. As the trustees of the town of Cochran are clothed by law with exclusive power over the streets, alleys and highways within the corporate limits of such town, the appellee, as the supervisor of a road district comprised of the same territory as the town, could not have any power over the streets, alleys and highways within the corporate limits of the town.

It follows, therefore, that the court erred in admitting evidence, over the objections and exceptions of the State, which tended to prove that the appellee had been duly elected, and had qualified, as supervisor of road district No. 5, and had done the acts charged against him in the information, as such supervisor, under the direction of the township trustee and in the supposed discharge of his official duty, because these facts, if proved, were immaterial, and did not and could not constitute any defence to this prosecution. Of course, the appellee's ignorance of the law, or his alleged good faith in the performance of the acts complained of, could not and did not afford him any valid or legal defence in this case. He was bound to know the law, and while it is doubtless true that he did not intend to commit a criminal offence, yet it is very clear that he did intend to do and perform the acts charged in the affidavit and information. In such a case,

Stevenson v. The State.

he ought to have been held amenable to the law for acts done in violation thereof. On this point, see the case of *Hood v. The State*, 56 Ind. 263.

Having reached the conclusion, that the decisions of the circuit court were erroneous, it is now considered by this court, that the State of Indiana do recover of the appellee the costs of this appeal.

STEVENSON v. THE STATE.

LIQUOR LAW.—Sale without License.—Indictment.—Evidence.—An indictment for selling intoxicating liquors without license must allege, though the State need not prove, that the defendant had no license when the sale charged was made.

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SAME.—Barter.—Gift.—Proof of a barter or gift of intoxicating liquors will not support an indictment charging a sale.

SAME.—Sale on Credit.—Proof of a sale upon credit may be sufficient to support such indictment.

SAME.—Sale by Defendant or His Agent.—A sale by the defendant, or by one authorized by him to make it, to the person named in the indictment, must be proved to justify a conviction.

from the Fountain Circuit Court.

A. Tipton and *S. F. Wood*, for appellant.

W. Woollen, Attorney General, *A. P. Harrell*, Prosecuting Attorney, and *T. L. Stilwell*, for the State.

PERKINS, J.—Indictment against John Stevenson, charging that he, "on or about the 7th day of December, 1878," at, etc., "did then and there unlawfully sell to John Joiner, intoxicating liquors, in a less quantity than a quart at a time, for the price of twenty-five cents, he, the said Stevenson, not being then and there licensed," etc.

The indictment was returned on the 12th of December, 1878. No objection was taken to it.

Stevenson v. The State.

The defendant pleaded not guilty. Trial by the court; conviction; motion for a new trial, on the ground that the conviction was contrary to the law and the evidence, overruled; a fine of twenty-five dollars assessed, and the costs adjudged against the defendant; exception entered, and an appeal taken to this court, in which there is an assignment of one, and only one, alleged error, viz.: That the finding of the court was contrary to the law and the evidence.

The evidence is in the record, and we copy it:

"I bought intoxicating liquor of the defendant in November, 1878, by a less quantity than a quart at a time. I paid for it. This was in Fountain county, Indiana. Bought a drink. I did not pay the money for it. I was hauling wood for the defendant, and expected him to take it out of the price of the wood. I have never had a settlement for the wood yet; don't know whether he charged me with the drink or not. I got the drink in his house, but don't know whether the defendant is the person who let me have it or not. I am not sure whether he was there or not. It may have been his book-keeper. Defendant kept a saloon in Veedersburgh, Fountain county, Indiana, and during the time I was hauling the wood, in the fall of 1878, I was in the saloon several times, and got drinks of whiskey when defendant was present. And this was all the evidence given in the cause."

This was an indictment for selling intoxicating liquor in a less quantity than a quart, to John Joiner, without license; and it was necessary to prove such sale on the trial of the cause, to justify a conviction of the appellee. The indictment did not allege a barter or gift of the liquor.

It was not necessary to such conviction that the State should prove that the appellee had not a license to retail, though it was necessary that the possession of such license should be negatived in the indictment. *Shearer v. The State*, 7 Blackf. 99; *Howe v. The State*, 10 Ind. 423; *Bicknell* Crim. Pr. 443.

Ridenour v. The State.

The sale is charged to have been made by the appellee. It was necessary to prove, to sustain this charge, that it was made, or authorized to be made, by him, and was expressly, or impliedly, for cash, but might have been on credit. A sale on credit might be within the statute. The liquor furnished in the instance particularly described in the testimony is not shown to have been sold by the appellee, yet the testimony showed that the witness "got drinks of whiskey several times in the fall of 1878, in the saloon of the defendant at Veedersburgh, in Fountain county, Indiana, when the defendant was present." These drinks were all prior to the finding of the indictment in this case, and were within the statute of limitations.

Upon the evidence in this cause, the conviction of the appellant was erroneous.

1. It was not proved that any liquor was sold to John Joiner, the person named as the purchaser in the indictment.

2. The instances particularly described in the testimony given on the trial, it is not proved that the sale was made or authorized by the appellant.

3. The drinks which the nameless witness got, "in the fall of 1878," were not proved to have been sold to anybody.

The judgment is reversed, and the cause is remanded for a new trial.

RIDENOUR v. THE STATE.

CRIMINAL LAW.—*Carrying Concealed Weapon.* On the trial of a defendant charged with carrying a concealed deadly weapon, the concealment alleged is a material fact, and, unless proved, a conviction can not be sustained.

Ridenour v. The State.

SAME.—*Immaterial Matters.—Intention.*—It is immaterial whether or not a pistol, charged to have been carried by the defendant concealed, was loaded, and as to what his intention was in carrying it.

From the Union Circuit Court.

J. Yaryan and J. W. Conaway, for appellant.

T. W. Woollen, Attorney General, and *B. Burke*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution for carrying a concealed weapon. The indictment charged, that on the 10th day of February, 1878, at the county of Union, "one Jacob Ridenour did then and there carry, concealed upon his person, a certain dangerous and deadly weapon, to wit, a pistol, commonly known as a revolver, the said Jacob Ridenour not then and there being a traveller."

The cause was tried by the court without a jury. There was a finding of guilty, and judgment accordingly.

On the trial, William Shera testified as a witness on behalf of the State as follows:

"One day last fall, and within the last two years, the defendant came into his store at College Corner, in Union county Indiana, and handed him a revolver, and asked him to load it. Witness loaded the revolver, and handed it back to the defendant, and defendant then left the store. The defendant had the revolver in his hand, the first witness saw of it; don't know what defendant did with the revolver after witness handed it back, as he was attending to customers; defendant was an acting constable at College Corner at the time; witness heard defendant say, before he left the store, he had an arrest to make the next day."

This was all the evidence given in the cause.

By a motion for a new trial, the defendant raised the question of the sufficiency of the evidence to sustain the finding, and that is the only question presented for our consideration here.

Albert, Cashier, etc., *et al.* v. The State, *ex rel.* Atkinson, Adm'r, *et al.*

The evidence, we think, did not tend to prove that the defendant had, at any time, carried the pistol, referred to by the witness, concealed upon his person, as charged in the indictment. There was nothing in the evidence, therefore, which raised any presumption of guilt against the defendant, and consequently nothing which put him upon his defence regarding his possession of the pistol. *Wiley v. The State*, 52 Ind. 516. Whether the pistol was loaded, and what the defendant's intentions were in having the pistol in his possession, were both immaterial questions in the cause. *The State v. Duzan*, 6 Blackf. 31; *Walls v. The State*, 7 Blackf. 572.

The evidence presents a case of a total failure in the proof to make out an essential and controlling element in the offence charged in the indictment, that is to say, the concealment of the pistol.

It follows necessarily, that the court below erred in refusing to grant a new trial, as prayed for by the defendant.

The judgment is reversed, and the cause remanded for a new trial.

ALBERT, CASHIER OF THE BANK OF PAOLI, ET AL. V. THE STATE,
EX REL. ATKINSON, ADM'R, ET AL.

INFORMATION.—*Quo Warranto*.—*Banking Association*.—*Receiver*.—Under sections 749 and 750 of the code, 2 R. S. 1876, pp. 298 and 299, an information in the nature of a *quo warranto* may be filed in the circuit court, in the name of the State, on the relation of a stockholder, against an alleged illegally organized banking association of this State, and its president, cashier and other stockholders, to compel the winding up and settlement of its affairs, the distribution of its assets, and the appointment of a receiver for that purpose.

SAME.—*Unlawful Organization*.—*Demand*.—Where such information avers, that, for want of a compliance with the requirements of the statute, the association had never been lawfully incorporated, and that the relator had

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Albert, Cashier, etc., *et al.* v. The State, *ex rel.* Atkinson, Adm'r, *et al.*

been induced to purchase stock in such association by the representations of its officers and other stockholders, and without knowledge of such illegality, it is not necessary to aver a demand upon the defendants by the relator.

SAME.—Trusts.—Statute of Limitations.—Where, by the facts alleged in the information, a trust appears to exist in favor of the stockholders, against the officers of the association, who are made defendants, and, in their answer of the statute of limitations, the facts constituting such trust are not denied, such answer is insufficient.

From the Orange Circuit Court.

J. Baker, for appellants.

F. Wilson and *M. F. Dunn*, for appellees.

Howk, J.—This was a suit by the relators of the appellee, against the appellants, the Bank of Paoli and Henry Comingore, president, and John C. Albert, cashier, of said bank. The complaint of the appellee's relators was, in form, an information in the nature of a *quo warranto*; and the special relief prayed for therein was, that the affairs of the pretended Bank of Paoli might be wound up, and a distribution made among the stockholders of its assets, if any remain after the payment of its debts, and for these purposes they asked for the appointment of a receiver, etc.

The appellants Albert, cashier, and Comingore, president, separately demurred to the appellee's complaint or information, upon the ground that it did not state facts sufficient to constitute a cause of action; which demurrers were severally overruled by the court, and to these decisions the said appellants severally excepted. A joint answer, in six paragraphs, was then filed by all the appellants; to each of which paragraphs, except the first, the appellee's relators demurred for the want of sufficient facts therein to constitute a defence to their action. This demurrer was sustained by the court to each of said paragraphs of answer; and to these decisions the appellants excepted. The first paragraph of their answer was then withdrawn by the appellants; and, they refusing to answer further, the court

Albert, Cashier, etc., *et al.* v. The State, *ex rel.* Atkinson, Adm'r, *et al.*

found for the appellee's relators, that the material allegations of their complaint were true, and that they were entitled to the relief therein demanded. The court then rendered a judgment and decree, in accordance with its finding, and appointed a receiver to take charge of, and wind up, the affairs of said Bank of Paoli; which said receiver accepted of said trust, and gave bond and qualified according to law and to the approval of the court, and was ordered to report his proceedings to the court at each term thereof.

In this court, the appellants have assigned, as errors, the following decisions of the circuit court:

1. In overruling their demurrers to the information or complaint;

2. In overruling their motion to strike out part of the complaint; and,

3. In sustaining the demurrer of the appellee's relators to the second, third, fourth, fifth and sixth paragraphs of the appellants' answer.

1. In their information or complaint the appellee's relators alleged, in substance, that the relator Nathan Farlow was the owner in his own right of five shares, of one hundred dollars each, and that the relator John Atkinson, as the administrator of Jonathan Farlow, deceased, was also the owner of five shares, of one hundred dollars each, of the capital stock of the appellant, the Bank of Paoli; that the institution known as the Bank of Paoli was organized and located at Paoli, Orange county, Indiana, about the year 1854, with a capital stock of fifty thousand dollars, of which capital stock each of the relators afterward became and then were the owners of shares as aforesaid; that, at the time of the organization of said bank, it was claimed and pretended, by those who took the capital stock therein, and by their successors in the ownership of said stock, that said bank was a legally

Albert, Cashier, etc., et al. v. The State, ex rel. Atkinson, Adm'r, et al.

organized banking association, under and pursuant to the act of the General Assembly of this State, approved May 28th, 1852, entitled "An act to authorize and regulate the business of general banking;" that, after its organization, the said banking association purchased real estate and fitted up banking rooms, deposited bonds and procured circulation to be delivered to it, and then issued the same as bank-notes, in accordance with the provisions of said act; that it also received deposits, and discounted notes and bills, and loaned money, as a bank; that when the appellee's relators became the owners of said shares, and for a long time afterward, they believed that said Bank of Paoli was a legally organized banking association, under said act; that, relying upon the claim and pretence that said bank was legally organized, they made no examination of the records of said bank, nor of the office of Secretary of State, nor of the office of the clerk of the Orange Circuit Court, to see whether or not said bank was legally organized, but relied wholly upon the representations made to them by the other stockholders and officers of said bank, that it was a legally organized banking association, under said act; that said bank never was legally organized or incorporated according to said act, in this: That said association never had made or signed any articles of association, such as the said act required, or any other articles, and that no copy of the same, such as said act required, nor any certificate, such as was required by the 18th section of said act, was ever filed in the office of the Secretary of State, nor in the office of the clerk of the Orange Circuit Court; that, during all the time since the pretended organization of said bank, the stockholders and officers thereof assumed and pretended to be a lawfully organized bank, and acted as such, without having the right so to do; and that the appellee's relators brought this action at the first term of the court, after they had discov-

Albert, Cashier, etc., et al. v. The State, ex rel. Atkinson, Adm'r, et al.

ered the fact of such illegality concerning such alleged bank. And the appellee's relators said, that by the sale of such capital stock to them and to others, and from other sources, the said pretended bank became the owner of real estate of the probable value of \$3,000.00, and of bonds, notes, bills and money, and personal property, of the aggregate value of \$60,000.00; that about 1864 the officers and stockholders of said pretended bank determined to wind up its affairs; that thereupon the real estate and bonds owned by said bank were sold, and its circulation was called in and redeemed, and its personal property was also sold; and that for the last ten years the said pretended bank had not transacted any banking business; that the appellant John C. Albert, who was then the owner by transfer of all the capital stock of said bank, except the stock owned by the appellee's relators, received the moneys derived from the sale of said real estate, personal property and bonds, as cashier of said pretended banking association; that the appellee's relators were ignorant of the amount so received by the said Albert, and of his disposition thereof; that all the books, papers and records of said pretended bank were in the possession of the appellant John C. Albert; and that no payments had been made to the appellee's relators, on account of their said stock, and no settlement of the affairs of said bank, between the stockholders thereof, had ever been made. Wherefore, etc.

In section 749 of the practice act, it is provided, that "An information may be filed against any person or corporation in the following cases: * * * * *

"*Third.* Where any association or number of persons shall act within this State as a corporation, without being legally incorporated." 2 R. S. 1876, p. 298.

It is very evident that the appellee's relators intended to state a case, in their information or complaint in this action, within the purview and meaning of this third clause

Albert, Cashier, etc., *et al.* v. The State, *ex rel.* Atkinson, Adm'r, *et al.*

of said section. In the last clause of section 750 of the same act, it is provided that such an information may be filed by any person, on his own relation, "Whenever he claims an interest in the * * * corporation, which is the subject of the information." 2 R. S. 1876, p. 299.

It is insisted by the appellants' counsel, that the information in this case was defective, on the demurrer thereto for the want of sufficient facts, in this, that it did not show that there was any money or property of the bank left to be divided or distributed among the stockholders. We do not think that this is a valid objection to the sufficiency of the information. The appellee's relators were not officers of the Bank of Paoli. They showed by proper averments, that the bank had been the owner of property, real and personal, worth more than sixty thousand dollars; that this property had been sold, and the proceeds of such sale had gone into the hands of the appellant Albert as cashier of said bank; and that they, the relators, were ignorant of the amount so received by said Albert, and of his disposition thereof. Long before the commencement of this suit, it was alleged, the officers and stockholders of said bank had determined that its affairs should be wound up; and this business had been left, where it properly belonged, in the hands of the appellants, as officers of the bank. Thirteen years had passed, and the appellants had made no settlement of the business of the bank, entrusted to them. Wearied with waiting, the appellee's relators began an investigation, which led to the discovery that the pretended bank had never been legally incorporated. Thereupon they brought this suit, and they have, in their information, stated a case which is expressly authorized by the letter and meaning of the clause of the statute above quoted, and entitles them, if true, to the relief prayed for.

Another objection, urged by the appellants' counsel to

Albert, Cashier, etc., *et al.* v. The State, *ex rel.* Atkinson, Adm'r, *et al.*

the information, is, that it contained no averment of any demand by the appellee's relators upon the appellants, before the commencement of this suit. It seems to us that no such demand was necessary. Indeed, we can not conceive of any proper demand to be made, in such a case. The theory of this case is, that the appellants were or had been acting as a corporation within this State, without having been legally incorporated; and that the appellee's relators had unwittingly become shareholders or stockholders in such illegal and pretended corporation. Surely, it was not necessary that the appellee's relators, before commencing this suit, should demand of the appellants that they should cease to act as such illegal corporation; and we know of no other demand, which would have been appropriate to the case made by the averments of the information. These are the only objections pointed out by the appellants' counsel, in argument, to the information in the case at bar, and, in our opinion, neither of these objections is well taken. The court did not err in overruling the appellants' demurrers to the information or complaint of the appellees' relators.

The appellants' motion to strike out part of the information, and the ruling of the court on this motion, were not made parts of the record by a proper bill of exceptions. Therefore, the second alleged error, complained of by the appellants, was not properly saved in the record, and presents no question for our decision. This rule of practice is well settled in this court. *Scotten v. Divilbiss*, 60 Ind. 37; *The School Town of Princeton v. Gebhart*, 61 Ind. 187.

The third error assigned by the appellants is the decision of the circuit court in sustaining the demurrers of the appellee's relators to the second, third, fourth, fifth and sixth paragraphs of the appellants' answer. Each of these paragraphs of answer was an affirmative plea of the statute of limitations, and nothing more. They differed each

Albert, Cashier, etc., *et al.* v. The State, *ex rel.* Atkinson, Adm'r, *et al.*

from the others only in this, that a different period of time was stated in each paragraph, within which, it was alleged, that the relators' cause of action did not accrue. Thus, in the second paragraph, the period named was six years; in the third it was seven years and six months, in the fourth it was twenty years, in the fifth it was fifteen years, and in the sixth paragraph it was sixteen years and six months.

It is very clear, that the relators' demurrer to the second, third and fourth paragraphs of the answer was correctly sustained; for the limitation mentioned in each of said paragraphs had not, and could not have, any applicability to the relators' cause of action, stated in the information. The fifth and sixth paragraphs of the appellants' answer set up the limitation of fifteen years, provided in section 212 of the practice act, that "All actions not limited by any other statute shall be brought within fifteen years." 2 R. S. 1876, p. 124.

This is the only limitation, as it seems to us, which could by any possibility be made applicable to the cause of action stated by the appellee's relators, in their information in this case. It will be observed, that the limitation of fifteen years is apparently relied upon, in both the fifth and sixth paragraphs of the answer; the apparent difference between the two paragraphs being, that, in the sixth paragraph, eighteen months were probably added to the fifteen years, because of the fact that one of the relators was an administrator, under the provisions of section 217 of the practice act. 2 R. S. 1876, p. 127.

In considering the sufficiency of these paragraphs of answer, it must be borne in mind that the officer and the stockholder of a bank bear to each other the relation of a trustee to a *cestui que trust*; and that relation once existing will continue until it is dissolved in some legal mode, or until "it is openly disavowed by the trustee, who in-

sists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*." *Oliver v. Piatt*, 3 How. (U. S.) 333; *Cunningham v. McKindley*, 22 Ind. 149.

We need hardly say, for it is self-evident, that, while the relation of trustee and *cestui que trust* might continue to exist between the appellants and the appellee's relators, the statute of limitations would never begin to run against, and would never constitute a bar to, the relators' cause of action. Therefore it seems to us, that each of the fifth and sixth paragraphs of the appellants' answer was insufficient, on the demurrer thereto for the want of facts, in this, that the appellants did not, in either of the said paragraphs, controvert any of the matters alleged in the relators' information, nor did they state therein affirmatively, that they had in any manner, or at any time, ceased to be officers of the bank wherein the relators were stockholders. Each of these paragraphs of answer virtually admitted that the facts alleged in the information were true; and, if the allegations of the information were true, then the mere lapse of time, however long continued, did not and could not afford the appellants any defence to the relators' cause of action, for the statute of limitations would not run against such cause of action, under the facts and circumstances stated in the information.

We are clearly of the opinion, that the court did not err in sustaining the relators' demurrer to the several paragraphs of the appellants' answer. *Nicholson v. Caress*, 59 Ind. 39; and *Caress v. Foster*, 62 Ind. 145.

The judgment is affirmed, at the appellants' costs.

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McGILL ET AL. v. BRUNER ET AL.

CITY.—*Precept for Sewer Improvement.—Appeal.—Complaint.*—On appeal by a property owner, to the circuit court, from a precept issued by the com-

McGill *et al.* v. Bruner *et al.*

mon council of a city to collect an assessment against his property for the cost of a sewer improvement, the transcript, certified by the city clerk as required by section 71, 1 R. S. 1876, p. 304, of the act for the incorporation of cities, etc., constitutes the complaint in the circuit court against such property holder.

SAME.—Omission in Transcript.—Certiorari.—Amendment.—City Clerk.—

Where, in such case, the transcript omits any material proceeding had before the common council, the proper practice is, not by a motion to make certain, but, upon cause shown, to procure a certiorari upon, or an order against, the city clerk, to supply the omission.

SAME.—Estimates of City Engineer.—Where such transcript shows, that, upon the completion of the improvement, a complete and corrected estimate of the cost had been made by the city engineer, and adopted by the common council, in the stead of partial estimates made during the progress of such improvement, the omission of such partial estimates from the transcript does not render it insufficient.

SAME.—Defence.—Interest of Third Party.—Making New Parties.—Under that proviso of said section 71, declaring, that, on such appeal, "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council," it is incompetent to either plead or prove that a third party claims title to the ground in which such improvement was constructed.

SAME.—Remedy.—Injunction.—The remedy of the property owner, in such case, is by an action, at the proper time, to enjoin or restrain the making of the improvements.

From the Marion Circuit Court.

J. S. Harvey, for appellants.

A. C. Ayres and *E. A. Brown*, for appellees.

NIBLACK, J.—This cause had its origin in certain proceedings in the common council of the city of Indianapolis, for the construction of a sewer, in and along Missouri street, from the north side of Market street to Kentucky avenue.

A transcript of those proceedings constituted the complaint in the court below. 1. R. S. 1876, p. 305.

By the complaint it was made to appear, that, on the 13th day of July, 1874, the said common council of the city of Indianapolis adopted an ordinance for the construction of a sewer, as above stated, providing, amongst other things, that a portion of the cost of such sewer should be

assessed against the lots and squares fronting upon it on both sides of Missouri street; that, on the 10th day of August, 1874, upon proper specifications and notice duly given, the contract for the construction of such sewer was let to the plaintiffs, Augustus Bruner and Russell M. Riner, who, on that day, entered into a contract, in writing, for the construction of the same; that partial estimates were made, from time to time, as the work progressed; that, on the 28th day of December, 1874, after the completion of the sewer, the city engineer reported a final and corrected estimate of the amounts due the plaintiffs for the construction of such sewer, from the several owners of real property fronting upon the same; that, on the same day, the common council adopted such final and corrected estimate as the true estimate of the respective amounts due the plaintiffs, under their contract, and ordered that all previous estimates be set aside for alleged errors in such previous estimates; also, that the amounts thus estimated to be due the plaintiffs should be severally assessed against the proper lots and squares, and the owners thereof required to pay such assessments; that, in this manner, and as a part of such proceedings, the sum of five hundred and thirty-four dollars and fifty cents was assessed against a square of ground, fronting upon and opposite to said sewer, owned by the defendants Robert C. McGill, Andrew McGill, Rebecca McGill, Jane McG. Waldo and Margaret Sullivan, as heirs at law of one Margaret McGill, deceased, and, said owners failing to pay said sum of money, a precept was issued by the common council to the treasurer of said city of Indianapolis, to enforce the collection of the same; that, from these proceedings, the defendants appealed to the circuit court.

The transcript of the proceedings before the common council did not contain the partial estimates of the amounts due the plaintiffs from time to time, above referred to, and

McGill et al. v. Bruner et al.

the defendants, for that reason, moved in the court below that the complaint be made more specific by requiring the plaintiffs to insert in it those partial estimates, but the court overruled their motion.

The defendants then demurred to the complaint for want of sufficient facts, but their demurrer was also overruled.

They thereupon answered in two paragraphs:

1. In general denial ;

2. " The defendants, further answering, say, that, at the time of the passage of said ordinance for the construction of said sewer, and the entering into said contract by the plaintiffs for the construction thereof, and at the time of the completion of the same by the same, said Missouri street, * * from the north side of Market street, in said city, to Kentucky avenue, * * was and now is the property of the Indianapolis, Cincinnati and Lafayette Railroad Company, which company has, and is entitled to, the exclusive possession thereof, and owns the same in fee; that said city had not, by condemnation or otherwise, secured the right to construct said sewer along said street, all of which defendants affirm to be true; and defendants further say, that a complete determination of this controversy can not be had without the presence of the said railroad company, and ask that the court cause said company to be joined in this action as party defendant."

The plaintiffs demurred to the second paragraph of the answer, and their demurrer was sustained.

The cause was then submitted to the court for trial. There was a finding against the defendants, for the amount assessed against their property, as above set forth, with interest, and, after overruling a motion for a new trial, judgment was rendered in favor of the plaintiffs, upon the finding, declaring the amount so found due a lien upon the square of ground against which it was assessed, and ordering such square to be sold to pay said lien.

Errors are assigned :

1. Upon the refusal of the court to require the complaint to be made more specific ;
2. Upon the overruling of the demurrer to the complaint ;
3. Upon the sustaining of the demurrer to the second paragraph of the answer ; and,
4. Upon the overruling of the motion for a new trial.

The transcript, as it was certified by the city clerk, as has been said, stood in the court below as the complaint. It being a certified copy of proceedings before another tribunal, the plaintiffs had not the same control over what it contained, or might not contain, that they would have had over a complaint in an ordinary action. They could not, at their discretion, add any thing to, or subtract any thing from, it. If the transcript omitted any material proceeding had before the common council, the proper practice would have been to have moved, upon cause shown, for a *certiorari* upon, or order against, the city clerk, to supply the omission.

We, therefore, see no error in the refusal of the court to require the plaintiffs to make the complaint more specific.

The objection urged to the sufficiency of the complaint is, that it did not contain a transcript of the above named partial estimates, made from time to time, as the work on the sewer progressed.

As has been stated, these partial estimates were set aside, and a final and corrected estimate adopted in their stead. When that was done, these partial estimates ceased to be a part of the record of proceedings before the common council, and were, hence, properly omitted from the transcript sent up by the city clerk. *Ball v. Balfe*, 41 Ind. 221.

No objection is pointed out to the final and corrected estimate, and we see none. We are consequently justi-

McGill *et al.* v. Bruner *et al.*

fied in concluding, that there was no error in the overruling of the demurrer to the complaint.

The statute provides, that, on the trial of a case like this, upon an appeal from the common council, "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council." 1 R. S. 1876, p. 305.

Under this provision of the statute, we think it was not competent for the defendants, after the completion of the sewer, to raise the question whether at the time of the passage of the ordinance, and the letting of the contract, for the construction of such sewer, the common council had such ownership or control of Missouri street as properly authorized it to construct the sewer in and along such street. That question might have been raised, doubtless, at the proper time by proceedings to enjoin or restrain the construction of the sewer, but it could not be set up as a defence of the action on the appeal to the circuit court. *Palmer v. Stumph*, 29 Ind. 329; *Moberry v. The City of Jeffersonville*, 38 Ind. 198.

The second paragraph of the answer tendered no material issue which the court below was authorized to try. The demurrer to it was, therefore, correctly sustained. *The City of Indianapolis v. Imberry*, 17 Ind. 175; *The Board of Commissioners of Allen County v. Silvers*, 22 Ind. 491; *Hellenkamp v. The City of Lafayette*, 30 Ind. 192; *The City of Lafayette v. Fowler*, 34 Ind. 140; *Kalbrier v. Leonard*, 34 Ind. 497; *McEwen v. Gilker*, 38 Ind. 233.

Upon the trial there was evidence tending to show, that, at the time of the passage of the ordinance for the construction of the sewer, and at the time of its construction, the ownership of Missouri street was in the Indianapolis, Cincinnati and Lafayette Railroad Company, and for that reason the appellants insist that their motion for a new trial ought to have been granted. But that evidence was

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

admitted over the objection of the appellees, and for reasons assigned as above, showing the insufficiency of the second paragraph of the answer, we are of the opinion that it was improperly admitted. It was, at all events, irrelevant and immaterial as a defence to the action.

We are unable to say that the court below erred in its refusal to grant a new trial, as prayed for by the appellants.

No sufficient reason has been shown for a reversal of the judgment.

The judgment is affirmed, at the costs of the appellants.

THE COLUMBUS, CHICAGO AND INDIANA CENTRAL R. W. Co. v.
THE BOARD OF COMMISSIONERS OF GRANT COUNTY ET AL.

RAILROAD.—*Appropriation to.*—*Order of County Commissioners in Special Session Illegally Convened.*—*Enjoining Collection of Tax Voted.*—An order made by a board of commissioners, at a special session not legally convened, granting the prayer of a petition for an election by the voters of a township upon a proposed appropriation to aid in the construction of a railroad, pursuant to the act of May 12th, 1869, 1 R. S. 1876, p. 786, is illegal and void; and the collection of a tax levied pursuant to such order and election may be enjoined at the suit of a tax-payer.

SAME.—*Petition.*—*Amount of Appropriation Asked.*—Where the amount of the appropriation asked by such petition exceeds two per centum of the assessed value of the taxable property of the township, as shown by the tax duplicate of the preceding year, the levy and assessment of a tax pursuant thereto are illegal and void, and the collection thereof may be enjoined at the suit of a tax-payer.

SAME.—*Lessor and Lessee.*—*Parties.*—The collection of taxes assessed in either of such cases upon a railroad belonging to one, and by it leased to another, railroad company, under an agreement that all taxes legally assessed on such property, and paid by the lessee, should be chargeable against the lessor, may be enjoined in an action by the lessor.

SAME.—*Curative Act.*—*Constitutional Law.*—In an action by the C., C. & I. C. R. W. Co., against the Board of Commissioners of Grant county, the county treasurer and the C., W. & M. R. R. Co., to enjoin the collection

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

of taxes assessed upon the property of the plaintiff as part of an appropriation voted by the voters of Mill township in said county, pursuant to a petition asking an appropriation of a sum exceeding two per centum of the assessed value of the taxable property of such township, filed, and ordered to be voted on, at a special session of such board illegally convened, the original complaint was filed and summons issued before, but the amended complaint was filed after, the passage of the act of February 3d, 1877 Acts 1877, Reg. Sess., p. 113, legalizing the acts of such board of commissioners therein.

Held, on demurrer to the amended complaint, that the Legislature in passing, and the Governor in approving, such act, invaded the province of the judiciary, and that, therefore, such act is unconstitutional and void.

From the Grant Circuit Court.

N. O. Ross, for appellant.

R. W. Bailey and A. Diltz, for appellees.

Howk, C. J.—This was a suit by the appellant, as plaintiff, against the appellees, as defendants, to enjoin the collection of certain taxes levied and assessed against the appellant's property. The appellees jointly demurred to the appellant's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court below, and to this decision the appellant excepted, and, refusing to amend its complaint, judgment was rendered against the appellant, on the demurrer, for the costs of this suit.

In this court, the only error assigned by the appellant is the decision of the circuit court, in sustaining the demurrer to its complaint, and the only question thereby presented for our decision is as to the sufficiency of the facts stated in said complaint to constitute a cause of action.

In its complaint, the appellant alleged, in substance, that it was, and for eight years before the commencement of this suit had been, a railroad corporation organized and existing under the general railroad laws of this State, and during all that time had been, and yet was, the owner of a railroad in this State, which extended from Union City to Logansport, Indiana, passing through Mill township, in

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

Grant county, together with all the rolling stock, tools and material used in operating said railroad during the years 1874 and 1875; that, during the said years, said railroad was operated by the Pittsburgh, Cincinnati and St. Louis Railroad Company, under an agreement between the parties, which authorized the last named company to pay all taxes legally assessed against said property of the appellant, and charge the same to the account of the appellant; that the appellee, the Board of Commissioners of Grant county, had attempted to levy a special tax upon said property of the appellant, in Mill township, in said county, to aid the appellee, the Cincinnati, Wabash and Michigan Railroad Company, in the construction of a railroad through said township, and had caused the auditor of said county to enter upon the tax duplicate, for that purpose, against said property of the appellant, for the year 1874, a tax of \$616.70, and for 1875 a tax of \$551.81, which tax, for each year, was assessed against the appellant's property, but in the name of said Pittsburgh, Cincinnati and St. Louis Railroad Company, and, with penalties and interest added thereto, remained unpaid; that the tax duplicates for said years 1874 and 1875 were in the hands of the appellee Isaac Cox, the treasurer of said county, for collection, who had demanded payment thereof, and threatened to collect the same by distress and sale, unless the same were paid; that the said taxes created a cloud upon the appellant's title to said railroad; that the said taxes had been assessed and entered upon said tax duplicates of said county, under and pursuant to certain proceedings claimed and purporting to have been had before said board of commissioners, and under and in pursuance of its orders entered upon the record of the proceedings of said board, a certified copy of which orders, marked "Exhibit A," was filed with and made a part of said complaint, and under and pursuant to a certain other order of said board, made on the — day of

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. et al.

June, 1875, as follows : " Ordered, that the auditor be, and he is hereby, ordered and directed to place upon the duplicate for 1875 the taxes voted in Mill township and Fairmount township to aid in the construction of the Cincinnati, Wabash and Michigan Railroad Co., the same being the amount voted less one per cent. levied on the taxable property of 1874, of said township ;" and that said taxes were assessed and entered upon said tax duplicate, under and in pursuance of no other or different authority whatever.

The appellant averred and charged, that the proceedings for the levy and collection of said tax, including the order for an election to determine whether such aid should be given, and all matters connected therewith, were defective, illegal and void, for the following, among other, reasons, to wit :

1. The Board of Commissioners of Grant county were not in legal session on the 15th day of April, 1874, when the petition was presented, asking that Mill township might make an appropriation to aid said Cincinnati, Wabash and Michigan Railroad Company in the construction of its railroad through said township, and when the order was made that the polls be opened for the votes of said township on the subject of said appropriation ; that the board was not in general session, because the law prescribed another and different time for such general session ; that the board was not legally in special session, because no summons had been issued by the auditor or any other officer of Grant county to the sheriff of said county, convening said board on that day, or on any previous day, from which the board had adjourned to that day ; that no such notice was served on said board nor on a majority thereof, nor was six days' notice given of said special session, nor was there, in the opinion of the officer calling said board, an emergency requiring a shorter time ; and that said pretended special session of said board was un-

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

authorized by any law of this State then in force, and was absolutely void, and its acts were of no binding force or validity whatever.

2. That the taxable property in said Mill township, on the tax duplicate of said county for 1873, was \$587,305, and no more, and that the sum asked in said petition to be given and ordered to be voted for, and which had been placed on the duplicate for collection, to give aid in the construction of said railroad, was \$16,200, which sum exceeded two per cent. upon the taxable property of said township on the tax duplicate of said county, delivered to the county treasurer, for the year preceding such application and order of election, to wit, for the year 1873; for which reason, said order for an election and all subsequent proceedings were absolutely void.

3. The only authority or levies of taxes, made by said board for said purpose, and under which the taxes against the appellant's property for the years 1874 and 1875 have been placed upon the tax duplicate, were as follows: "It is therefore ordered, that a tax of one per cent. be levied and charged on the tax duplicate of said township, including the corporation of Jonesboro, which is within said township, for the year 1874, for the purpose of collecting the sum of \$8,100, to so aid said railroad company, provided said levy shall not exceed one per cent. of said year, which is to be charged on said duplicate for 1874, and collected as other taxes; that a like per centum, to wit, one per centum, be so levied and charged on the taxable property of said township, including said town of Jonesboro, for the year 1874, which is to be so charged on said duplicate for 1875, and collected with said taxes of 1875, for the purpose of collecting and paying said remainder of said sum so voted for, to wit, \$8,100, which sums are hereby appropriated and ordered to be paid over to said railroad company, in all respects according to the provisions of the

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

law in such cases made and provided, approved May 12th, 1869, and the several amendments to said law on the subject of voting aid to railroad companies;" and the following order, made on the — day of June, 1875, to wit: "Ordered, that the auditor be, and he is hereby, ordered to place upon the duplicate for 1875 the taxes voted in Mill township and Fairmount township to aid in the construction of the Cincinnati, Wabash and Michigan Railroad Co., the same being the amount voted less one per cent. levied on the taxable property, of 1874, of said township."

The appellant further said, that the total amount of property entered upon the tax duplicate in Mill township, outside of the corporation of Jonesboro, to be charged with taxes for 1874, was \$574,040, and within said corporation, \$211,775, making together \$785,815; and for the year 1875, the property in Mill township, outside the corporation of Jonesboro, amounted to \$559,605, and within said corporation it was \$200,610, amounting together to \$760,215; that the levy for 1874 was invalid, *first*, because it was not definite in the amount of the levy, and, *second*, because the amount levied exceeded one per cent. of the taxable property on the duplicate for that year; that the levy for the year 1875 was invalid, because the amount of the levy was not fixed by the board, but was left to be determined by the auditor.

4. The levies were invalid, because made upon the property taxable within the corporate limits of the incorporated town of Jonesboro. The appellant further said, that the total amount of property charged against the appellant, or the Pittsburgh, Cincinnati and St. Louis Railway Company, for the year 1874, was \$61,670, and for the year 1875 was \$52,866, while the amount of the special tax entered upon the duplicate against said property, for the aforesaid purposes, was \$616.70 for 1874, and \$581.52 for 1875, which was an excess over one per cent., for 1875, on

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

the property entered on the tax duplicate as the appellant's property for that year, and the levy for 1875 was, for that reason, illegal and void.

6. The said tax was assessed and levied, and payment thereof was sought to be enforced, to raise money and make a donation thereof to said Cincinnati, Wabash and Michigan Railroad Company, and for no other purpose whatever, and the levy, for that reason, was illegal and void, on the ground that the statute authorizing donations by townships to aid in the construction of railroads was unconstitutional.

Wherefore the appellant prayed, that the said taxes might be declared to be illegal and void, and the appellees, and each of them, might be enjoined from collecting or attempting to collect the same, or any part thereof, etc.

This action was commenced in the circuit court, on the 7th day of November, 1876; but the amended complaint, the substance of which we have set out, was not filed until the 6th day of February, 1877. Between the time of the commencement of the action, and the time of the filing of said amended complaint, to wit, on the 3d day of February, 1877, an act was passed by the General Assembly of this State, and duly approved, entitled "An act to legalize the official acts of the Board of Commissioners of Grant county, Indiana, done at a special session of said board, held on the 14th and 15th days of April, 1874, in relation to the hearing of petitions praying said board to order elections to be held in the townships of Mill and Fairmount, in said county, for the purpose of voting aid, in favor of the construction of the Cincinnati, Wabash and Michigan Railroad, under an act entitled 'An act to authorize aid to the construction of railroads by counties and townships taking stock therein, and making donations to railroad companies,' approved May 12th, 1869, and the several acts and parts of acts amendatory thereof, since en-

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. et al.

acted, and also to legalize the subsequent proceedings had, and orders made, in pursuance of said elections, at their regular June sessions for the years 1874 and 1875." Acts 1877, Reg. Sess., p. 113.

Two questions are presented for decision in this case, as follows :

1. Under the law of this State, as it existed at the time this suit was commenced, did the appellant's complaint state facts sufficient to constitute a cause of action ?

2. If the first question ought to be, and must be, answered in the affirmative, what effect, if any, should the curative act, above entitled, of February 3d, 1877, have upon the proper decision of this case ?

We will consider and decide these questions, as briefly as we can, in the same order in which we have stated them.

1. It seems to us that the appellant's complaint in this case stated facts sufficient to show a present cause of action, when the suit was commenced. If the facts stated in the complaint were true, and as they were well pleaded the appellees' demurrers admitted their truth, the taxes levied and assessed by the Board of Commissioners of Grant county, upon the appellant's property in Mill township, in said county, to aid the Cincinnati, Wabash and Michigan Railroad Company in the construction of its railroad, were clearly illegal, invalid and void. The proceedings, which led to the levy and assessment of the taxes sought to be enjoined, were evidently intended to be had and held under and pursuant to the provisions of the act of May 12th, 1869, authorizing counties and townships to aid in the construction of railroads. It was indispensably necessary, we think, to the legality of those taxes, that the proceedings in question, in their inception and in every material step subsequently taken, should have conformed strictly to the requirements of the statute.

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

If it be true, as alleged in the complaint, that the Board of Commissioners of Grant county were not in legal session, when the petition was presented for an appropriation by Mill township to aid in the construction of said railroad, and when the order was made for submitting the question of such appropriation to the votes of the legal voters of said township, it is clear that the proceedings of the board were illegal in their inception, and that the levy and assessment of taxes pursuant thereto were illegal, invalid and void. For, by the 1st section of said act of May 12th, 1869, it was expressly required that the petition should be presented to, and the order made by, the board of commissioners at a "regular or special session thereof." 1 R. S. 1876, p. 736.

If it be true, as charged in the complaint, that the taxable property of Mill township, on the tax duplicate of Grant county, for 1878, the year preceding the presentation of said petition, was five hundred and eighty-seven thousand three hundred and five dollars, and no more, and that the amount of the appropriation "specified in such petition," and ordered to be voted for and placed on the duplicate for collection, to aid in the construction of said railroad, was sixteen thousand two hundred dollars, it can not be questioned, we think, that these fundamental proceedings were wholly unauthorized by law, were in excess of the powers conferred by the statute, and that the levy and assessment of taxes pursuant thereto were illegal, invalid and void. For, by the terms of the statute, the amount of the appropriation must be specified in the petition, and must not exceed "two per centum upon the amount of the taxable property of such township." Under the averments of the appellant's complaint, the amount of the appropriation, specified in the petition, and ordered to be voted for and placed upon the duplicate for collection, was nearer three per centum than two per centum of

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

the alleged taxable property of said Mill township. *The Detroit, etc., R. R. Co. v. Bearss*, 39 Ind. 598.

But we need not pursue this question; for it is clear, beyond a peradventure, that the facts stated in the complaint were sufficient to show, that the taxes assessed upon the appellant's property, to aid in the construction of said railroad through Mill township, were illegal, invalid and absolutely void.

The point is made in argument by the appellees' counsel, that, under the allegations of the complaint, the Pittsburgh, Cincinnati and St. Louis Railroad Company was the only party plaintiff in this action. Perhaps, under the same proper averments, the Pittsburgh, Cincinnati and St. Louis Railroad Company might have maintained a similar action, for the same purpose, though that is a question we need not and do not decide; but, as the appellant was the owner of the property on which the taxes were assessed and were a lien, and as, under the agreement set out in the complaint, the taxes legally assessed, and paid by the P., C. & St. L. R. R. Co., were a proper charge against the appellant, we are clearly of the opinion, that this action was properly brought in the name of the appellant.

2. We pass now to the consideration of the second question above stated, namely, What effect, if any, did the curative act of February 3d, 1877, have upon the taxes described in the complaint, the collection of which taxes the appellant sought to enjoin in and by this action? This is the important and controlling question in this case. We have already given the title of the act referred to, and we find it necessary to the proper presentation of the question to be considered, that we should set out also the act itself. The act and its preamble read as follows:

"Whereas, it appears that the auditor of Grant county, Indiana, issued a summons to the commissioners of said county, on the 14th day of April, 1874, to meet in special session on said day; and,

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

“Whereas, it appears that said board met in pursuance to said summons, but that the record of said board does not show that they so met, on the summons of said auditor; and,

“Whereas, it appears that said board adjourned on said day, to meet on the following day, the same being the 15th day of April, 1874, which fact is not shown by the record; and,

“Whereas, it appears that said board met on the 15th day of April, 1874, in pursuance to said adjournment, which is not shown by their record; and,

“Whereas, it appears that on said 14th and 15th days of April, 1874, while so in special session, said board heard petitions praying them to order elections to be held in the townships of Mill and Fairmount, in said Grant county, to vote aid to the construction of the Cincinnati, Wabash and Michigan Railroad, and in accordance with the prayers of said petitioners, ordered said elections to be so held; and,

“Whereas, it appears that at the regular June session, 1874, of said board, they made orders levying a tax of one per cent. upon the taxables of said townships, in pursuance of said elections, the same being one-half of the amount so voted, in which orders appear the following words, to wit: ‘Provided said levy shall not exceed one per cent. of said year,’ and which words were not intended to be a part of said orders; and,

“Whereas, it appears that at the regular June session 1875, of said board, they made an order levying the remainder of the taxes so voted, less one per cent. levied on the taxable property of 1874, of said townships; and,

“Whereas, it has been represented to the General Assembly that the irregularities in the proceedings, orders, and records of said board of commissioners, in relation to said railroad tax, will likely produce lawsuits for the recov-

The C., C. & I. C. R. W. Co. v The Board of Comm'rs of Grant Co. et al.

ery of the tax collected on said levies, and thereby cause irreparable injury to the interests of said county, therefore,

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That all orders made and proceedings had by said Board of Commissioners of said Grant county, of and concerning the elections held for voting aid to the construction of the Cincinnati, Wabash and Michigan Railroad, in said Mill and Fairmount townships, and all orders and proceedings, by said board, concerning the levying of the taxes voted at said elections, whether at a special or regular session, be and the same are hereby legalized and rendered valid, as though said board had been regularly summoned to meet in special session, and the orders and records properly entered and made in accordance with law.

"SEC. 2. As an emergency exists requiring the immediate taking effect of this act, therefore the same shall be in force from and after its passage."

It is claimed by the appellant's counsel, that this legalizing or curative statute is unconstitutional and void; and this is the question we must meet and decide. We are very loth, as a rule, to question the constitutionality of a statute, which has been deliberately enacted by the General Assembly, and has obtained the sanction of executive approval. We do not question, but we recognize with pleasure, the ability, the intelligence, the learning and the faithfulness to duty of the distinguished citizens who are chosen by the people, from time to time, to fill the legislative and executive departments of our State government. They, like the judges of our courts, are bound by their official oaths to support the constitution of the State. In the third article of that constitution, it is provided as follows:

"SECTION 1. The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person, charged with official duties under one of these de-

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. et al.

partments, shall exercise any of the functions of another, except as in this constitution expressly provided."

It is very clear, we think, that, in the enactment and approval of the statute now under consideration, the legislative and executive departments of our State government have exercised, or attempted to exercise, judicial functions. The forms and rules which usually control judicial proceedings were not observed in the passage of said act. In the absence of, and we may assume without notice to, the parties, individual and corporate, whose rights of property were to be seriously affected, if not concluded, by the proposed legislation, without issue joined, without evidence heard, and without a hearing awarded to them and their counsel, the General Assembly made a special finding, in and by the preamble of the act above quoted, of the truth of certain disputed and controverted matters of fact, and, upon such finding, adjudged and declared in the body of the act, that all orders made and proceedings had by the Board of Commissioners of Grant county, of and concerning the elections for voting aid to the construction of the Cincinnati, Wabash and Michigan Railroad, in Mill and Fairmount townships, and of and concerning the levying of the taxes voted at said elections, were thereby legalized and rendered valid.

No one can doubt, as it seems to us, that the Legislature, in the passage of this preamble and statute, invaded, held and exercised the functions of the judicial department of our State government, and that, for this reason, the act above quoted must be held to be unconstitutional and void. The powers of the General Assembly are almost unlimited; but they can not, as a rule, try and determine the rights of parties to a pending lawsuit.

We have said that the proceedings of the Board of Commissioners of Grant county, in relation to the appropriation by Mill township to aid in the construction of the Cincinnati, Wabash and Michigan Railroad, and the levy

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

and assessment of taxes pursuant thereto, were illegal, invalid and absolutely void. This question presents itself for decision : Was it within the power of the General Assembly, in and by the act above quoted, to legalize and render valid the illegal, invalid and void proceedings of the Board of Commissioners of Grant county ? We are clearly of the opinion that this question must be answered in the negative.

The case of *McDaniel v. Correll*, 19 Ill. 226, is in point. In that case it appeared that a statute had been enacted to make valid certain illegal proceedings, by which an alleged will was adjudged void, and which were had against non-resident defendants, over whom the court had obtained no jurisdiction. On appeal, the Supreme Court of Illinois said : " If it was competent for the Legislature to make a void proceeding valid, then it has been done in this case. Upon this question we can not for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding, than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other."

In the case of *Denny v. Mattoon*, 2 Allen, 361, in discussing the validity of a legalizing or curative statute, it was said by the Supreme Court of Massachusetts, Bixlow, C. J., delivering the opinion :

" The wise and salutary provision in our constitution, by which its framers sought to declare the distribution of the different powers of the government and to keep them separate and distinct, is not a mere abstract truth. It is capable of a practical application, by which each department may be made to operate within its own appropriate sphere, so as to accomplish the great end of securing a government of laws and not of men. Although it may be difficult, if not impossible, to lay down any general rule which may serve to determine, in all cases, whether

The C., C. & I. C. R. W. Co. v. The Board of Comm'rs of Grant Co. *et al.*

the limits of constitutional restraint are overstepped by the exercise by one branch of the government of powers exclusively delegated to another, it certainly is practicable to apply to each case, as it arises, some test by which to ascertain whether this fundamental principle is violated. If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well settled rules of law the arbitrary will of the Legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The Legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding."

See, also, on this subject, *Ervine's Appeal*, 16 Pa. State, 256, 268; *Richards v. Rote*, 68 Pa. State, 248; *Cooley Const. Lim.*, 3d ed., p. 106, *et seq.*, and foot notes.

The case at bar is very similar to the example given by Chief Justice BIGELOW, in the above quotation from his opinion. The record shows, that, on the 29th day of November, 1876, the court below overruled the appellees' demurrer to the appellant's complaint. After the passage of the curative statute above quoted, the court sustained the appellees' demurrer to the appellant's complaint. Here we have "the arbitrary will of the Legislature" controlling the action of the court before which this suit was pending. We do not doubt, that the curative statute above quoted was an unauthorized act of legislation, because it was a direct

Dawson et al. v. The State.

infringement on the peculiar and appropriate functions of the judicial department of our State government; and therefore we hold that the statute in question was and is unconstitutional and void.

For the reasons given, we think that the circuit court erred in sustaining the appellees' demurrer to the appellant's complaint.

In what we have said, we do not question the power of the Legislature to enact general laws, regulating the practice in courts of justice, which may materially affect or change the decision of causes pending before the courts. But it seems to us, that it is not within the power of the Legislature, by a special act, directed to a particular case then pending before the courts, to change the decision of that case. Special legislation on such subject is prohibited by sections 22 and 23 of the fourth article of the constitution of this State.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to overrule the appellees' demurrer to the appellant's complaint, and for further proceedings in accordance with this opinion.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

DAWSON ET AL. v. THE STATE.

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CRIMINAL LAW.—Verdict.—Acquittal.—A verdict finding a defendant guilty of a crime charged in one count of an indictment, without any special finding as to other counts thereof, operates as an acquittal on the latter.

SAME.—Indictment.—Arrest of Judgment.—Where an indictment charges a public offence, a motion in arrest can not be sustained for defects on its face.

Dawson *et al.* v. The State.

SAME.—*Indictment Cured by Verdict.*—*Burglary with Intent to commit Larceny.*—After verdict, where no motion to quash has been made, an indictment for burglary with intent to commit larceny is not insufficient, on motion in arrest, merely on account of the omission of the word "personal" as descriptive of the "goods and chattels" which the defendant is alleged to have intended to steal.

SAME.—*Evidence.*—*Possession of Stolen Goods.*—Where, on the trial of such indictment, the evidence shows the defendant to have been in the immediate locality of the alleged burglary, both before and after its commission, and that he had possession, and sold or otherwise disposed, of goods stolen in connection with such burglary, the Supreme Court will not disturb a verdict of guilty on account of the absence of evidence that the defendant broke into the building mentioned in the indictment.

From the Fountain Circuit Court.

H. H. Dockterman, for appellants.

C. A. Buskirk, Attorney General, and *T. L. Stilwell*, Prosecuting Attorney, for the State.

BIDDLE, C. J.—Indictment in two counts, against the appellants. The first count charges, omitting the formal, introductory part of the indictment, "that John Dawson and James Burton, late of said county, on or about the 30th day of July, A. D. 1877, at and in said county and State aforesaid, did then and there, in the night-time, unlawfully, feloniously and burglariously break and enter into the storehouse of Newton Boord, then and there situate, with the intent, the goods and chattels of the said Newton Boord, then and there being, then and there, unlawfully, feloniously and burglariously to steal, take and carry away, contrary," etc.

The second count of the indictment, charging the appellants with larceny, need not be stated, for reasons which will appear in the course of this opinion.

The appellants pleaded not guilty to the indictment, were tried by a jury, and found guilty of burglary, as charged in the first count. No express finding was had upon the second count. This was a legal acquittal of the larceny, and leaves the case

Dawson et al. v. The State.

before us the same as if the second count of the indictment was not in the record. 'After verdict, the appellants moved the court for a new trial. Their motion was overruled, and exceptions reserved. They then moved in arrest of judgment, on the ground that the facts stated in the first count of the indictment do not constitute a public offence. This motion was also overruled, and exceptions reserved.

The counsel for appellants, in his brief, discusses three questions:

1. That the first count in the indictment does not contain facts sufficient to constitute a public offence;
2. That the court below erred in overruling appellants' motion in arrest of judgment; and,
3. That the court below erred in overruling the appellants' motion for a new trial.

As no motion was made to quash the indictment, the first question raised is not before us, except as a basis for the second.

The objection taken to the first count of the indictment, under the second question, is, that the felony intended to be committed in connection with the breaking is insufficiently alleged, and that the defect lies in the want of the word "personal," to give character to the goods and chattels intended to be stolen. Whether this alleged defect would be fatal to an indictment merely charging a larceny, we do not decide; and whether the first count of the indictment before us could have withstood a motion to quash, we do not decide; but we are clearly of the opinion that, after verdict, it must be held good. When an indictment charges a public offence, a motion in arrest of judgment can not be sustained for defects upon its face. *Bishop v. The State*, 50 Ind. 125; *McGuire v. The State*, 50 Ind. 284; *Laydon v. The State*, 52 Ind. 459.

Under the third question, the counsel for appellants insists, that the evidence given in the case does not sustain

Bittinger v. Bell et al.

the verdict. It shows clearly that the storehouse was broken open during the night of July 30th, 1877, and that a larceny was committed at the same time and place, and tends strongly to show that the appellants were at a scale house near the storehouse, on the evening of the same night; that, on the morning next after the burglary and larceny were committed, they were at the store-house; that, on the 1st day of August, 1877, the two appellants were met in the highway, in the vicinity, each carrying a bundle of the stolen goods, and that Dawson sold his bundle to Cales, his father-in-law, without measuring or examination; and that, on the 3d day of August, 1877, Dawson was at Watseka, Illinois, with a bundle of goods, and said to a woman there, "We have a lot of goods, and I want you to make them up for me and the children." The appellants, in their testimony, state essentially the same facts, except that they deny breaking into the storehouse and stealing the goods, and deny having any of the goods at any time. The jury that tried the case saw the stolen goods, heard the witnesses testify, and we think the evidence is such as would fairly convince them beyond a reasonable doubt, that the appellants committed the burglary, as charged in the first count of the indictment.

There is no judicial reason to disturb the verdict.

The judgment is affirmed, with costs.

Opinion filed, and petition for a rehearing overruled, at November Term, 1877.

This cause, by mistake, was omitted from the proper report.

BITTINGER v. BELL ET AL.

PARTIES DEFENDANTS.—*Who are Necessary.*—*Statute Construed.*—Under section 18 of the code, 2 R. S. 1876, p. 89, all parties whose interests, under the issues, are adverse to the interests of the plaintiff, and who, of necessity, must and will be affected by the judgment in the cause, or who

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| 157 | 478 |
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| 162 | 608 |
| 65 | 445 |
| 166 | 184 |
| 166 | 186 |
| 166 | 187 |
| 167 | 57 |

Bittinger v. Bell et al.

are necessary parties to a complete determination or settlement of the questions involved, must be made parties defendants.

SAME.—*Railroad.—Appropriation by Township.—Enjoining Tax.—Township.—County Commissioners.—Railroad Company.—Petitioners.*—In an action by a tax-payer, against a county treasurer, to enjoin the collection of a tax levied as an appropriation voted by a township to aid in the construction of a railroad, the township is a necessary party defendant, but the railroad company and the board of county commissioners are not; and neither are the petitioners for the appropriation where their interests are not affirmatively shown by the complaint to be adverse to the plaintiff.

SAME.—*Amendment in Proceedings of County Commissioners.*—Any error in the proceedings before the board of county commissioners to secure such appropriation must be amended, if amendable at all, by the board, on application made to it as such, and can not be made in or by the circuit court, in such action for an injunction.

SAME.—*New Parties Defendants.—Tax-Payer of Township.*—A tax-payer of the township, alleging himself to be in favor of the appropriation as made, and that the defendant is not a tax-payer of such township, should, on proper application, be allowed to appear, answer to and defend such action.

SAME.—*Appropriation by Township on Condition.—Case Distinguished.*—In a proceeding under the act of May 12th, 1869, 1 R. S. 1876, p. 786, a condition contained in the petition and notice of election, that the appropriation should be made, and stock taken, by the township, only in case of the location and construction, by the railroad company, of a depot at a certain point, is valid. *The Indiana, etc., R. W. Co. v. The City of Attica*, 56 Ind. 476, distinguished.

SAME.—*Levy of Tax.—Informality not Fatal.*—The fact that the county commissioners, on being duly informed that such appropriation had been voted by such township, entered of record an order granting the prayer of the petition, and levying the whole of the appropriation as a tax, but extending on the duplicate, for collection during the current year, a lawful part only thereof, and deferring the residue until the succeeding year, does not invalidate the same.

SAME.—If an order by a board of commissioners is substantially right, it is not rendered invalid by mere informality.

QUERY.—Can a petitioner for such an appropriation maintain an action to enjoin the collection of the tax?

BIDDLE, J., dissents, denying the constitutionality of the act authorizing such appropriation.

From the Warren Circuit Court.

L. T. Miller, J. R. Coffroth and T. A. Stuart, for appellant.

J. M. Rabb, J. McCabe and W. P. Rhodes, for appellees.

Howk, J.—This was a suit by the appellees, “each the owner of personal and real property in Pike township,” in Warren county, Indiana, “subject to taxation for the year 1877,” as plaintiffs, against the appellant, Samuel Bittinger, treasurer of said Warren county, as defendant. The object of the suit was to obtain a perpetual injunction against the appellant, as treasurer of said county, restraining and enjoining him from collecting, or attempting to collect, a certain tax which had been levied and assessed on the taxable property in said Pike township, for the purpose of enabling said township to make an appropriation of thirteen thousand dollars to aid in the construction of the Mississippi and Atlantic Railroad, in said township. Pending the litigation in the circuit court, the appellant presented to the court the verified petition of Benjamin F. Evans, praying, for the reasons therein stated, that he might be admitted as a party defendant in said action, and permitted to defend the same, which petition the court overruled and denied, and to this ruling the appellant excepted, and filed his bill of exceptions.

To the appellees’ amended complaint the appellant’s demurrer, for a defect of parties defendants, and for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court, and his exception was entered to this decision. The appellant then answered the amended complaint, to which answer the appellees demurred, for the want of sufficient facts therein to constitute a defence to their action. This demurrer was sustained by the court, and to this decision the appellant excepted, and refused to plead further. Thereupon the court rendered judgment in favor of the appellees and against the appellant, for a perpetual injunction as prayed for, in the amended complaint, from which judgment this appeal is now here prosecuted.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

Bittinger v. Bell et al.

1. In overruling his demurrer to appellees' amended complaint;

2. In overruling the petition of Benjamin F. Evans to become a party defendant in this action; and,

3. In sustaining the appellees' demurrer to the appellant's answer.

We will consider these alleged errors in their enumerated order, and decide the questions thereby presented.

1. In their amended complaint, the appellees alleged, in substance, that they were the owners of personal and real property in Pike township, in Warren county, subject to taxation for the year 1877, of the assessed value, in the aggregate, for said year, of more than two hundred thousand dollars, as the same had been assessed and charged to them on the tax duplicate of said county, then in the hands of the appellant, as treasurer of said county; that, on the 9th day of March, 1877, at a regular session of the board of commissioners of said county, a petition signed by thirty-one persons claiming to be freeholders and legal voters of said township was presented to said board, asking an appropriation of the sum of thirteen thousand dollars by said township, to aid in the construction of the Mississippi and Atlantic Railroad in said township, a copy of which petition was filed with and made part of said complaint; that thereupon the said board, assuming to act under the authority of the act of the General Assembly of this State, approved May 12th, 1869, touching appropriations by counties and townships in aid of railroads, took said petition under advisement, which proceedings were then and there entered upon the record of said board, a copy of which record was filed with and made part of said complaint; that, pursuant to the order of said board of commissioners, the auditor of said county gave notice of an election to be held at the usual places of voting in said township, on the 21st day of April, 1877, by publication thereof in the "Warren Republican," a weekly newspaper printed and published,

and of general circulation, in said county, four weeks successively, more than thirty and less than sixty days preceding the said 21st day of April, 1877, and by printed handbills of said notice, which were posted by the sheriff of said county in ten of the most public places of said township, for four weeks successively, more than thirty and less than sixty days before said 21st day of April, 1877, for the purpose of taking the votes of the legal voters of said township upon the subject of appropriating money by such township, for the purpose of aiding in the construction of said railroad, as prayed for in said petition, a copy of which notice was filed with and made part of said complaint; that said auditor afterward, on the 27th day of April, 1877, made his official certificate that handbills had been posted as aforesaid, which certificate he, on the same day, entered upon the records of said board of commissioners, a copy of which was also filed with said complaint; that, on said 21st day of April, 1877, an election was held for said purpose in said township, at the usual places of voting therein, pursuant to said notice and petition in all respects; that, at such election, 229 votes were cast, 152 of which were in favor of said appropriation and 75 against it, and one ballot voted blank; that afterward, on the next succeeding Thursday, the proper officers of said election met at the court-house, in Williamsport, in said county, between the hours of ten o'clock A. M. and six o'clock P. M., as a board of canvassers, canvassed the vote and declared the result as aforesaid, filed a statement thereof with said auditor of said county, who entered the same at length on the record of said board of commissioners, a copy of which was filed with and made part of said complaint; that, at the regular June session of said board of commissioners, to wit, on the — day of June, 1877, claiming still to act under and by virtue of the aforesaid proceedings solely, said board made and en-

Bittinger v. Bell et al.

tered upon its record an order granting the prayer of said petition, and made a pretended levy of a special tax of thirteen thousand dollars, upon the real and personal property in said township liable to taxation for state and county purposes, for said year of 1877, and ordered one per cent. to be extended on the tax duplicate, a copy of which order was filed with and made part of said complaint; that afterward said auditor, claiming to act solely by virtue of and pursuant to the aforesaid proceedings, did extend the said special tax of one per centum against the real and personal property in said township, liable to taxation as aforesaid, and did put the same upon the tax duplicate of said county for said year 1877; that said one per centum so pretended to be levied was not one-half of said sum of thirteen thousand dollars, the amount specified in said petition; that said tax duplicate, containing such pretended levy, was delivered by said auditor of said county to the appellant, as treasurer of said county, and he, as such treasurer, was threatening and attempting to collect said railroad tax from the appellees, he claiming to act and the right to collect the same from no other power or authority than that conferred on him by and through the above recited proceedings; that the appellant would, unless restrained by the order of the court, proceed to seize and sell their property aforesaid to make said pretended tax; and that said pretended tax, so voted, levied and extended on said tax duplicate, was void:

1st. Because of the condition contained in the petition and notice for the appropriation and election, that said Mississippi and Atlantic Railroad Company should locate and construct a depot upon its line of road, within the corporation limits of the town of West Lebanon:

2d. Because the publication of notice was defective;

3d. That the notice itself was defective and void, for the reason it contained said condition;

4th. The petition was void for uncertainty;

5th. The notice of election was void for uncertainty ;

6th. The pretended levy, so made as aforesaid by said board, was void for uncertainty ;

7th. That said pretended levy was void, because it was made for the whole amount specified in the petition, namely thirteen thousand dollars, whereas it should have been for at least but one-half thereof, and not exceeding one per cent. of the personal and real property in the township ;

8th. Because the pretended levy, if construed to mean but one-half of the amount, specified in the petition, was more than one per centum on the real and personal property in the township ; and,

9th. That each and all of said papers, orders, votes and proceedings were void for informality, irregularity, uncertainty and non-conformity with the statute in such case made and provided.

Wherefore the appellees prayed, that the appellant might be perpetually enjoined from attempting, in any manner, to collect said tax so voted, and said levy so made and extended, or any part thereof, and that, by the decree of the court, the whole of the proceedings recited in said complaint might be declared null and void, and for all other proper relief.

As we have seen, the appellant demurred to the appellees' complaint, upon two grounds of objection, to wit :

1. For a defect of parties defendants, in this, that the Board of Commissioners of Warren county and the Mississippi and Atlantic Railway Company, mentioned in the complaint, and the petitioners, who are mentioned in the complaint, and Pike township, in said Warren county, should each be a party defendant, each being a necessary and proper party to a complete and proper determination of the matters alleged in said complaint ;

2. For a want of sufficient facts to constitute a cause of action.

Bittinger v. Bell *et al.*

We will first consider and decide the questions which fairly arise under the first ground of demurrer to the complaint. It is sometimes difficult to determine satisfactorily, as to who are necessary, and who should be regarded as merely proper, parties to the complete determination of the cause in hearing. In section 18 of the practice act, it is provided, that "Any person may be made a defendant who has, or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved." 2 R. S. 1876, p. 39. This section is in effect a re-enactment of the rule in equity, in relation to parties defendants. The parties who ought to be and must be made defendants, under this section of the code, as we construe it, are the parties in interest adverse to the plaintiff, an interest involved in the issues, and who, of necessity, will be and must be affected by the judgment in the cause. So, also, any person, "who is a necessary party to a complete determination or settlement of the questions involved," must, by the letter of the statute, be made a defendant to the action. These are the rules which govern pleadings in chancery, in relation to necessary parties, and these rules were substantially re-enacted, in our code of practice, as applicable alike to all suits at law as well as in equity, "without distinction between law and equity." *Newcomb v. Horton*, 18 Wis. 566; *Story Eq. Plead.*, chap. 4; *Lube Eq. Plead.*, chap. 8; *Mitford Plead.* 164; and *Moak's Van Santvoord Plead.* 105.

Applying these rules to the case at bar, and the appellant's demurrer for a defect of parties defendants to the appellees' complaint, it seems very clear to us, that the demurrer was well taken, in so far as "Pike township, of Warren county," a body politic and corporate of that name and style, mentioned in the complaint, was con-

cerned. It certainly appeared upon the face of the complaint, that the corporation named Pike township, was a necessary party to this action. The special tax, which had been levied and assessed for the year 1877, upon the taxable property within the limits of that township, as alleged in the complaint, was levied and assessed for the express purpose of raising money to enable the corporation, Pike township, to aid in the construction of a certain railroad through its territory, by subscribing and paying for a certain amount of the capital stock of the railroad company. It seems to us that no argument can be necessary for the purpose of showing that the corporation, Pike township, was not only a proper, but a necessary, party defendant to this action, which was brought, as we have seen, to enjoin the collection of such special tax. That far forth, we are of the opinion, that the court erred in overruling the demurrer to the complaint, for a defect of parties defendants.

But, as to the other parties named in this ground of demurrer, to wit, the Board of Commissioners of Warren county, and the Mississippi and Atlantic Railway Company, and the petitioners, who were mentioned in the complaint, it seems to us, that it can hardly be said that they, or any of them, were necessary parties to a complete determination of the questions involved in this action. It has been repeatedly decided by this court, in cases similar to the one at bar, that, until the tax was levied and collected, and a legal and valid subscription had then been made on behalf of the township, the railroad company did not have, and could not acquire, any legal right to or interest in the tax, which it could enforce by legal process. *The Board, etc., of Crawford County v. The Louisville, etc., Air Line Railway Co.*, 39 Ind. 192; *Sankey v. The Terre Haute, etc., Railroad Co.*, 42 Ind. 402; *Petty v. Myers*, 49 Ind. 1; *Jager v. Doherty*, 61 Ind. 528.

It would seem to follow, that, if the Mississippi and At-

Bittinger v. Bell et al.

lantic Railway Company had no legal right to, nor interest in, the tax in controversy in this suit, which it could enforce by process of law, it could not be a necessary party to the action.

We fail to see any good or sufficient reason for making the Board of Commissioners of Warren county a party to the action. It is suggested, that the board should have been made a party defendant, "so that if there had been any error in the proceedings, it might have been corrected." If there were error in the proceedings of the board, in connection with the tax in controversy, we do not think that such error could be corrected by the court below in this action. Whether such error was one of form or of substance, it seems to us, that any application for the correction of such error should be addressed, in the first instance, to the board of commissioners, as a court having jurisdiction of the matter, and not as a party defendant to an action in another court.

In their argument of this cause, the appellant's counsel have failed to suggest any reason, and we can see none, for making the original petitioners for the appropriation in aid of the railroad company, parties defendants to the action, as necessary parties thereto. It did not appear on the face of the complaint, that the interests of those petitioners, at the time of the commencement of this suit, whatever they might have been before that time, were necessarily adverse to the interests of the appellees in this action. Unless the interests of the petitioners appeared in the complaint to be adverse to those of the plaintiffs, the appellees, the petitioners, would not, we think, be necessary parties defendants; for it can hardly be claimed, that they would be necessary parties to a complete determination or settlement of the questions involved in this action.

In this connection, we may properly consider and decide the question presented by the second alleged error,

namely, the decision of the court in overruling the petition of Benjamin F. Evans to become a party defendant in this action. In his petition, the said Evans represented that he was then, and for several years last past had been, a resident voter, freeholder and tax-payer in said Pike township, in Warren county, Indiana; and he then set out, in his petition, copies of all the proceedings had by and before the board of commissioners of said county, for an appropriation by said township in aid of the construction of said railroad in and through said township, and for the levy and assessment of the tax in controversy, for that purpose. In conclusion, he further represented that the appellant, Bittinger, had no interest in the matter in controversy, except as treasurer of said county of Warren, and was not a freeholder or a legal voter in said Pike township. Wherefore the said Evans asked that he might be admitted to defend this action in his own name and behalf, and in behalf of all other citizens and legal voters, who were in like interest and sympathy with him. This petition was duly verified by the oath of the petitioner.

We are clearly of the opinion that the court erred in overruling and denying the prayer of this petition. It can not be denied but that Benjamin F. Evans, as a resident citizen and tax-payer of Pike township, had an interest in the matter in controversy in this action; and if he believed, as he apparently did, that his interests, and the interests of Pike township, would not be subserved by the success of this suit, he ought to have been admitted as a defendant, and permitted to defend the action, in his own name and behalf. It is true, that the appellant, Bittinger, by reason of his office, was a proper and necessary party defendant; but, as he was neither a citizen of, nor an owner of property in, said Pike township, it could hardly be expected that he would take the same active interest in the defence of this suit, as it may be presumed

Bittinger v. Bell et al.

that Benjamin F. Evans would have taken if he had been admitted as a party defendant.

We return now to the consideration of the second ground of the appellant's demurrer to the appellees' complaint, that it did not state facts sufficient to constitute a cause of action.

It was alleged by the appellees in their complaint, that the tax in controversy was void, because of the condition contained in the petition and notice for the appropriation and election, that said Mississippi and Atlantic Railway Company should locate and construct a depot upon its line of road, within the corporate limits of the town of West Lebanon. In their brief of this cause, in this court, the appellees' learned counsel have insisted with earnestness and ability, that this condition was not authorized by the statute, and rendered null and void the petition and all the proceedings had thereon, which led to the levy of the tax. It is not claimed by counsel, that the petition in question did not contain every requisite of the statute, but it is claimed that the petition was void because it contained a condition, which the statute neither required nor prohibited. The petition asked for an appropriation by Pike township, to aid in the construction of the railroad in said township, and to the town of West Lebanon, by taking stock in the railroad company to the amount of \$13,000; and the condition in the petition was, "that said subscription of stock to said railway company be made upon the condition, that said company locate and construct a depot on their line of road, within the corporation limits of West Lebanon."

The question for decision, as it seems to us, is this: Did this condition vitiate the petition, and render it and all proceedings had thereunder absolutely void? The entire proceedings, from and including the presentation of the petition, until the order levying the tax in controversy,

were had and held by the Board of Commissioners of Warren county, under the provisions of "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies," approved May 12th, 1869. 1 R. S. 1876, p. 736. As we have already said, there is nothing in this statute which can be construed as a prohibition against townships making their subscriptions of stock to aid in the construction of a railroad, upon such a condition as the one above set out. By section 4 of "An act to provide for the more uniform mode of doing township business," etc., approved February 18th, 1859, each and every township, then or thereafter organized in any county in this State, was declared a body politic and corporate, by the name and style of — township, — county, according to the name of the township and county in which the same might be organized, "and by such name may contract and be contracted with, sue and be sued in any court having competent jurisdiction." 1 R. S. 1876, p. 900. With this general power to contract and be contracted with, existing in the corporate township, and with the special power given by the statute, upon compliance with its requirements, to the township to make a contract with a railroad company by a subscription to its capital stock, to aid in the construction of its railroad within the township limits, it seems to us that it may well be held, as we now hold, that the township may, in making its subscription and in the preliminary proceedings which enable it to make the subscription, prescribe such reasonable conditions as are not in conflict with either the letter or the spirit of the law. We are clearly of the opinion, that the condition above set out was not prohibited by any of the provisions of the statute, and that it did not vitiate or avoid either the petition or any of the proceedings had thereon which led to the levy of the tax in controversy in this suit. This

Bittinger v. Bell et al.

conclusion is upheld and sustained, we think, by the doctrine enunciated in several of the decisions of this court. *Fisher v. The Evansville, etc., Railroad Co.*, 7 Ind. 407; *The Evansville, etc., Railroad Co. v. The City of Evanville*, 15 Ind. 395; and *Smith v. Allison*, 23 Ind. 366.

It is claimed by appellees' counsel, in argument, that the doctrine of the case of *The Indiana North and South R. W. Co. v. The City of Attica*, 56 Ind. 476, is in point, and is decisive of the question we are now considering. But we fail to see how that case can have any possible bearing upon the case now before us. To our minds, the two cases are utterly dissimilar, in every respect, differing as widely from each other, as does a donation to a railroad company differ from a subscription to its capital stock.

It was alleged by appellees, in their complaint, that the tax levy was void, because it was made for the whole amount specified in the petition, namely, thirteen thousand dollars, whereas it should have been for at least but one-half thereof, and not exceeding one per cent. of the personal and real property in the township. We do not think that the tax levy, as made by the board of commissioners, by any fair construction of its terms, is open to the appellees' objection. The order of the board for the levy of the tax was as follows:

"And now comes on to be heard the matter of the petition from the citizens of Pike township, praying for an appropriation to be made to aid the Mississippi and Atlantic Railway Company in the construction of their railroad to the town of West Lebanon, in said township; and the commissioners having heretofore, to wit, on the 8th day of March, 1877, entered an order for an election to be held in said township upon the subject-matter of said petition, and which said election was held under said order, on the 21st day of April, 1877, and a majority of the votes cast at said election being in favor of said railroad appro-

priation, it is hereby ordered that the prayer of said petition be granted, and that a special tax, aggregating the amount of thirteen thousand dollars, be levied upon real and personal property of said township of Pike, liable to taxation for State and county purposes, and that one per cent. shall be, and is ordered to be, extended upon the tax duplicates, for the purpose of paying in part said appropriation, and that the remainder of said sum of thirteen thousand dollars be deferred until June, 1878, which said special tax shall be collected as other taxes are collected for State and county purposes."

Construing this order in connection with the petition and the proceedings had thereon, and the provisions of the statute applicable thereto, it seems to us that no one, however unlearned in the law, could mistake its terms or misapprehend what was meant or intended thereby. It is not to be expected that the orders of a board of commissioners will be drafted with that degree of legal accuracy and precision of statement usually found in the orders, decrees and judgments of the circuit court. There are no established forms or precedents for the orders of a board of commissioners; and, if those orders are right in substance, their form will be of little consequence. We think the order above set out was substantially correct. The chief object of such an order is for the guidance of the county auditor, in entering the tax levied upon the proper duplicate. It does not appear from any of the allegations of the appellees' complaint, that the auditor of Warren county misunderstood, or was misled by, the terms of the order complained of. We think that the tax levied by the Board of Commissioners of Warren county, to enable Pike township to aid in the construction of the contemplated railroad within its limits, was not void for any of the reasons alleged in appellees' complaint.

In our opinion, the court erred in overruling the appellant's demurrer to the appellees' complaint.

Vance v. The State.

As we have reached the conclusion, that the appellees' complaint did not state facts sufficient to constitute a cause of action in their behalf, and that the tax in controversy was not void for any of the reasons alleged, we deem it unnecessary for us now to consider or decide the important and interesting question presented by the third error assigned by the appellant—the sustaining of a demurrer to his answer. It was alleged in this answer, *inter alia*, that the appellees were all petitioners, before the board of commissioners, for the levy of the tax which they seek in this action to have declared null and void. Upon this answer, the question arises, whether the appellees were or were not estopped, by their action as such petitioners, from questioning the validity of the tax levy. The appellant's counsel insist that the appellees were so estopped. This question we leave undecided; but we cite, for the benefit of all who may be interested in the question, the authorities relied upon by appellant's attorneys in support of their position. *Cooley Taxation*, p. 373; *Kellogg v. Ely*, 15 Ohio State, 64; *Wiggin v. The Mayor, etc.*, 9 Paige, 16; *Battershall v. Davis*, 31 Barb. 323; *City of Burlington v. Gilbert*, 31 Iowa, 356; 1 Greenl. Ev., secs. 207 and 210; *The State v. Hudson*, 5 Vroom, 25; *Hawley v. Griswold*, 42 Barb. 18; and *The People v. Goodwin*, 5 N. Y. 568.

BIDDLE, J., denies the constitutional power to levy the tax, and upon that ground dissents.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to sustain the appellant's demurrer to the complaint, and for further proceedings in accordance with this opinion.

VANCE v. THE STATE.

CRIMINAL LAW.—*Rape*.—*Indictment*.—*Grammatical Construction*.—*Evidence*.—*Variance*.—*Idem Sonans*.—An indictment charged, that, on, etc., at

Vance v. The State.

etc., the defendant "*did* then and there unlawfully, in and upon *Dellia* Weaver, a woman, forcibly and feloniously make an assault, and her, the said *Dellia* Weaver, then and there, unlawfully, forcibly and against her will, feloniously ravish and carnally know ; contrary," etc.

Held, that the verb *did* is used conjunctively, and pertains to both branches of the sentence, and that the indictment is sufficient.

Held, also, that evidence of such assault upon *Della* Weaver will not authorize a conviction.

From the Madison Circuit Court.

W. A. Kittinger, *A. L. Roache* and *E. H. Lamme*, for appellant.

T. W. Woollen, Attorney General, and *T. B. Orr*, Prosecuting Attorney, for the State.

WORDEN, C. J.—An indictment was returned against the appellant, the charging part of which was as follows :

"The grand jury," etc., "on their oath do present and charge, that Alexander Vance, late of said county, on the 23d day of June, A. D. 1878, at said county and State aforesaid, did then and there unlawfully, in and upon *Dellia* Weaver, a woman, forcibly and feloniously make an assault, and her, the said *Dellia* Weaver, then and there, unlawfully, forcibly and against her will, feloniously ravish and carnally know, contrary," etc.

A motion to quash the indictment was made and overruled, and exception taken. Trial by jury, conviction, and sentence of imprisonment in the state-prison for the term of two years.

The appellant claims that the indictment is bad, because it does not charge any thing upon the defendant, except the assault ; in other words, that the auxiliary verb "*did*" only pertains to that portion of the compound sentence charging the assault, and not to that portion relating to the rape. But we think it pertains to both branches of the sentence, and that the meaning is the same as if the word had been repeated in the latter branch of the sentence. "The several acts are stated conjunctively,

Vance v. The State.

and the verb 'did,' where it occurs, must be held to apply to all of them." *Whitney v. The State*, 35 Ind. 503.

The indictment was good.

On the trial, it appeared that the name of the person upon whom the rape was perpetrated was Della Weaver. There is a little confusion in the evidence as to her surname, but we think it was clearly enough shown to have been Weaver. It quite clearly appeared that her christian name was Della and not Dellia or Delia. This variance in the christian name can not be imputed to improper orthography adopted by the reporter of the evidence. It was brought out very clearly by the evidence, that the christian name was Della and not Dellia. Thus, the prosecutrix, having been put upon the stand by the State as a witness, and being asked her name, responded, "Della Weaver."

The following questions were asked, and answers given, upon cross-examination :

"Ques. What is your husband's name ?

"Ans. His name is Pinn Weaver. Burdell is his name.

"Ques. What is his given name ?

"Ans. That is his given name, Burdell Weaver, and they call him Pinn Weaver a part of the time.

"Ques. I want to get his right name ; is not his name Lindsey Burdell ?

"Ans. I believe it is.

"Ques. Your name would be Delia Burdell ?

"Ans. Della is my name.

"Ques. Your proper name would be Della Burdell ?

"Ans. Della Weaver."

There was further evidence as to the surname Weaver.

The appellant claims that there is a fatal variance between the christian name of the prosecutrix, as alleged in the indictment, Dellia, and that proved on the trial, Della, and in our opinion the point is well taken. The two

Schoonover v. Dougherty et al.

names are not *idem sonans*. Putting the *i* out of Dellia takes a sound from the name that can not be recognized at all in De.. In the case of *Black v. The State*, 57 Ind. 109, the true rule on the subject was held to be, "that if the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial."

But here the two names can not be sounded alike, without utterly destroying the power of the vowel *i* in Dellia, and rendering it entirely mute.

For this variance the judgment below will have to be reversed.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.

SCHOONOVER v. DOUGHERTY ET AL.

MISTAKE.—*Complaint to Reform Deed.*—*Subsequent Encumbrancer.*—In an action by the grantee, against the grantor, and an execution creditor and the sheriff, to reform a conveyance of real estate, and to enjoin a threatened sale on such execution, the complaint alleged, that, "through the mistake, inadvertence and oversight of the grantor and of the draftsman of said deed," a tract of real estate which the grantor did not own, instead of the tract which he did own and which he had sold and intended to convey to the grantee, was described in the deed; that the deed was duly recorded, within fifteen days after its execution and delivery; and that, between the execution and the recording of the deed, a judgment had been rendered in favor of such creditor and against the grantor, in the circuit court of the county wherein the real estate lay, and that it was about to be sold on execution issued on such judgment.

Held, on demurrer by the execution creditor, that, for want of an allegation that such misdescription was the result of a mutual mistake by the grantee, as well as by the grantor and draftsman, the complaint is insufficient.

From the Warren Circuit Court.

Schoonover v. Dougherty et al.

J. A. Stein, A. O. Behm, J. Park and G. O. Behm, for appellant.

M. Milford, for appellees.

Howk, C. J.—In this action, the appellant sued the appellees, in a complaint of a single paragraph, to obtain the reformation of a certain conveyance of real estate, and an injunction against the appellees. The suit was against other defendants, in addition to the appellees; and, as to said other defendants, the appellant obtained a judgment by default.

The appellees demurred to the appellant's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action against them, which demurrer was sustained by the court, and to this ruling they excepted. The appellant refusing to amend his complaint, judgment was rendered against him, in favor of the appellees, Josiah S. and David Dougherty, on their demurrer, for their costs. It is from this latter judgment, that the appellant has appealed to this court; and he has here assigned, as error, the decision of the circuit court, in sustaining the appellees' demurrer to his complaint. By this error, the only question presented for our decision is this: Does the appellant's complaint state facts sufficient to constitute a cause of action in his favor, and against the appellees, Josiah S. and David Dougherty?

As necessary to the proper understanding and determination of this question, we will give a summary of the facts stated in the appellant's complaint. The appellant alleged, in substance, that, on the 22d day of June, 1875, the defendants Stephen D. Briggs and Rebecca J. Briggs, his wife, for a valuable consideration to them rendered, executed, acknowledged and delivered to the appellant a warranty deed, which was recorded on July 7th, 1875, by the recorder of Warren county, Indiana, and was set out at length, with the certificate of acknowledgment, in said

complaint; by which said deed the grantors therein conveyed and warranted to the appellant, for the sum of four thousand dollars, the following real estate in Warren county, Indiana, to wit: The south-east quarter of section 12, in township 21 north, of range 9 west, containing forty acres more or less; that, in the execution of said deed, the defendants Stephen D. and Rebecca J. Briggs, in truth and in fact, intended to convey and warrant to the appellant the south-east quarter of the north-east quarter of said section 12, in township 21 north, of range 9 west, in said Warren county, containing forty acres more or less, being the only land in said county then owned by said grantors; but that, through the mistake, inadvertence and oversight of said grantors, and of the draftsman of said deed, the land so intended to be conveyed was erroneously described as the south-east quarter of said section 12, which mistake escaped the attention of said grantors and of the appellant until long after said deed was recorded; that, at the June term of the Warren Circuit Court, and after the delivery of said deed, to wit, on the 26th day of June, 1875, the appellees, Josiah S. and David Dougherty, recovered a personal judgment, in said court, against said Stephen D. Briggs for \$1,200.00 damages, and costs, upon which judgment an execution had been issued in due form, duly tested by the clerk and seal of said court, and directed to the sheriff of said county; that said execution had come to the hands of the defendant Mahlon J. Haines, then sheriff of said county, who had levied the same upon the said south-east quarter of the north-east quarter of said section 12, as the property of the defendant Stephen D. Briggs, and had caused the same to be advertised, in the manner prescribed by law, to be sold at sheriff's sale, on Saturday, the 9th day of October, 1875, between the hours of 10 A. M. and 4 P. M. of said day; that, by reason of the premises, the appellant was entitled to have said deed reformed so

Schoenover v. Dougherty et al.

that it should be held to convey to him the land originally intended to be conveyed; that the sheriff's threatened sale of said land would produce great injury to the appellant, pending this litigation, as it might result in the sale of the land to a party innocent of the appellant's equities therein, and thereby tend to render ineffectual the relief which the appellant might be entitled to in this action; that all the said acts prejudicial to the appellant's interests were being done, and threatened to be consummated, by the appellees and said sheriff; and that an emergency existed why they should be restrained immediately from proceeding further with said sale, until the final hearing of this cause, or until the further order of the court. Wherefore the appellant prayed judgment for the reformation of his deed, so that it might correctly describe the land intended to be conveyed thereby, that his title thereto should be established, as of the date of said deed, free and clear from the lien of the appellees' said judgment, and that the appellees and the sheriff might be perpetually enjoined from levying upon or selling said land under any execution issued, or to be issued, on said judgment, and for other proper relief.

It is very clear, we think, that the appellant's complaint did not state facts sufficient to constitute a cause of action against the appellees, Josiah S. and David Dougherty. They were strangers to the deed which the appellant was seeking to have reformed in this action. Within four days after the date of the deed, the appellees obtained a judgment against the defendant Stephen D. Briggs, the grantor in said deed, in the circuit court of the county in which the grantor's real estate was situate, and thus acquired a valid and subsisting lien upon and interest in any real property in said county, then owned by the judgment defendant. It will be observed, that there is no allegation of any mistake on the part of the appellant, the grantee named in the deed, which he seeks to have re-

formed, in this suit, or that the alleged mistake in the drafting, execution and delivery of the deed, was the mutual mistake of all the parties thereto, of the grantee as well as of the grantors therein. Where a party brings an action to obtain the reformation of a deed or other written instrument, by the correction of an alleged mistake of fact therein, his complaint must show by the facts stated therein, that the mistake in question was the mutual mistake of all the parties to such deed or instrument, or the courts will not, as a rule, rectify and correct such mistake, by the reformation of such deed or instrument. This must be regarded as the settled law of this State, on the subject now under consideration. *Nelson v. Davis*, 40 Ind. 366; *Allen v. Anderson*, 44 Ind. 395; *Baldwin v. Kerlin*, 46 Ind. 426; *Barnes v. Bartlett*, 47 Ind. 98; *Heavenridge v. Mondy*, 49 Ind. 484; and *Nicholson v. Caress*, 59 Ind. 39.

Another point is made by the appellees' counsel, in discussing the sufficiency of the facts stated in the appellant's complaint to constitute a cause of action. Counsel insists that the complaint was fatally defective, on the appellees' demurrer thereto, because it did not state, in clear and precise terms, what consideration, if any, the appellant had actually paid, or agreed to pay, for his deed which he sought to have reformed in this action. Of course, if the appellant was a mere volunteer, in accepting his deed from the grantors, he would not have been entitled, even as against them, and much less so as against the appellees, who were strangers to the deed, to the reformation of the deed and the correction of any mistake of fact therein. *Andrews v. Andrews*, 12 Ind. 348; *Froman v. Froman*, 13 Ind. 317; *Randall v. Ghent*, 19 Ind. 271. But we need not and do not consider or decide the sufficiency of the complaint in this regard. Upon the first ground of objection, the failure to allege in the complaint, that the mistake of

Beckner *et al.* v. The Riverside and Battle Ground Turnpike Co.

fact in the deed was the mutual mistake of all the parties thereto, the appellees' demurrer to the complaint was correctly sustained.

The judgment is affirmed, at the appellant's costs.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

BECKNER ET AL. v. THE RIVERSIDE AND BATTLE GROUND
TURNPIKE CO.

PRACTICE.—*Demurrer Waived by Pleading.*—A demurrer to a complaint is waived by answering without requiring a decision on the demurrer.

TURNPIKE COMPANY.—*Complaint for Stock Subscription.*—*Averment that Subscription is Due.*—*Notice by Publication.*—*Demand.*—*Cured by Verdict.*—In an action by a turnpike company, to collect stock subscribed to it by the defendants and payable "in such instalments, and at such times, as the company may direct," the complaint alleged that the company ordered "that the subscription" should be paid "in three equal instalments, in thirty, sixty and ninety days from June 1st, 1872," and that "said plaintiff demanded payment of" such subscription "of said defendants, on the 1st day of April, 1874, with which demand said defendants refused to comply. Wherefore," etc.

Held, on assignment questioning the sufficiency of the complaint, that its averments sufficiently allege the subscription to be due and unpaid, and that it was not necessary to allege either demand, or the publication required by section 11, 1 R. S. 1876, p. 658.

SAME.—*Defence.*—*Alteration of Route.*—*Statutes Construed.*—An answer in such action alleged, that, after the signing of the company's articles of association, the company had altered the line of its road specified in such articles, between the *termini*.

Held, on demurrer, that the company had power to change the route of their road to avoid obstacles and obtain the best route, except as to its *termini* and general direction, and that, therefore, the answer is insufficient.

SAME.—*Construction of Written Evidence.*—*Instruction to find for a Party named.*—The only evidence given on the trial of such cause by the plaintiff being contained in written instruments fixing a *prima facie* liability

Beckner *et al.* v. The Riverside and Battle Ground Turnpike Co.

on the defendants, and they having introduced no evidence tending to prove a defence, it was not erroneous to instruct the jury to "find for the plaintiff, for the amount of the subscription, less any payments which may be proven, because the variations proven are immaterial."

From the Tippecanoe Circuit Court.

J. M. Larue, F. B. Everett and E. A. Greenlee, for appellants.

J. A. Wilstach and J. A. Stein, for appellee.

BIDDLE, J.—Complaint, by appellee, against the appellants, to collect a stock subscription.

Demurrer to the complaint for want of facts; but, before the demurrer was decided, the appellants answered:

1. By a general denial;
- 2 and 3. Special paragraphs.

Demurrer for want of facts, to the second paragraph of answer, sustained, and demurrer for want of facts, to third paragraph, overruled.

Reply to third paragraph. Trial by jury, and verdict for appellee. By a motion for a new trial and assignments of error, the appellants have presented four questions for our consideration:

1. The overruling of the demurrer to the second paragraph of answer;
2. The sufficiency of the complaint;
3. The propriety of giving a certain instruction to the jury; and,
4. The sufficiency of the evidence to support the verdict.

1. Being in the proper order, we first examine the sufficiency of the complaint. By answering, the appellants waived their decision on the demurrer to the complaint; but, by an assignment of error, they have presented the question of its sufficiency in this court. The principal objection taken to the complaint is, that it contains no allegation that the stock was due and unpaid. The allegation of non-payment in the complaint is as follows: "Said

Beckner *et al.* v. The Riverside and Battle Ground Turnpike Co.

plaintiff demanded payment of said \$400 of the defendants, on the 1st day of April, 1874, with which demand said defendants refused to comply; wherefore," etc. In the case of *Higert v. The Trustees of Indiana Asbury University*, 53 Ind. 326, it was held, in a complaint upon a subscription of money to the building fund of a college, that the words, "though often requested, the defendant has failed and refused, and still fails and refuses, to pay the same, or any part thereof," were equivalent to an allegation that the money "remains unpaid," and were sufficient; and we think the breach of non-payment in this may be held good after verdict.

It is also objected to the complaint, that it contains no averment of a publication in a newspaper, thirty days previous to the time when the payment of stock was required, according to sec. 11, 1 R. S. 1876, p. 658. Such averment is necessary only when the stock is not payable at a fixed time, or not upon a given contingency, as upon call by the directors. In this case, the undertaking of the appellants was, to pay "in such instalments, and at such times, as the company may direct;" with an averment in the complaint, that the company had "ordered that the subscription of stock be paid to the treasurer in three equal instalments, in thirty, sixty and ninety days from June 1st, 1872."

The money thus became due, according to the terms of the call, which the stockholders were bound to notice, without either publication or demand made. *Ross v. The Lafayette and Indianapolis R. R. Co.*, 6 Ind. 297; *The New Albany, etc., R. R. Co. v. McCormick*, 10 Ind. 499; *Breedlove v. The Martinsville and Franklin R. R. Co.*, 12 Ind. 114; *Heaston v. The Cincinnati and Fort Wayne R. R. Co.*, 16 Ind. 275; *Haun v. The Mulberry and Jefferson Gravel Road Co.*, 33 Ind. 103; *Estell v. The Knightstown and Middletown Turnpike Co.*, 41 Ind. 174; *Miller v. The Wild Cat Gravel Road Co.*, 52 Ind. 51.

Beckner *et al.* v. The Riverside and Battle Ground Turnpike Co.

2. Overruling the demurrer to the second paragraph of answer, which may be stated, substantially, as follows :

After admitting the subscription for stock, as alleged in the complaint, the defendants averred :

That the sole consideration for the subscription was, that said road should be constructed on the line described in the articles of association ; that, on said line and by said route, all of the points to be touched were what are known as Scott's mill and the mill-race connected with said mill, by which route said road would have passed contiguously certain lands owned by the defendants, and would have greatly benefited the defendants, by enhancing the value thereof ; but that, subsequent to signing the articles of association, and subsequent to the subscription by the defendants of the stock, said company, over the protest of the defendants, changed the line and route of said road from the line and route described in said articles of association, and constructed said road so as to pass a quarter of a mile north of said mill-race and through the lands of said defendants, and thereby said road became and is an injury and damage to said defendants, instead of a benefit. Wherefore, etc.

In considering the sufficiency of this paragraph of answer, the question as to whether, and how far, a company may subsequently change its line of road from that described in the articles of association, becomes material. By section 1 of the act of May 12th, 1852, 1 R. S. 1876, p. 650, the articles of association must state "the line of the route, and the place to and from which it is proposed to construct the road." * * * Section 4 enacts, that "The directors of said company shall proceed to locate and lay out said road." * * * This would seem to contemplate a discretion in the directors in selecting the line and route between the *termini* of the road. At least, it is clear that it is not necessary to fix the exact line and

Beckner *et al.* v. The Riverside and Battle Ground Turnpike Co.

route between the *termini* named in the articles of association, or the act would not have provided afterwards, that the directors should "proceed to locate and lay out said road;" for, if it was necessary to fix the exact line and route in the articles of association, the road would already have been laid out and located. By section 15 of the same act, it is provided that "The company may change the line of its road whenever it may deem it of public importance and for the improvement of the road, but shall not avoid the points mentioned in their articles of association." By the third clause of section 1 of the act of June 9th, 1852, 1 R. S. 1876, p. 664, which is a later act, it is provided that, "Where a certain line or route is designated in the charter, the same may be varied from, to avoid hills or other obstacles and to obtain the best route: *Provided*, That nothing herein contained shall be so construed as to authorize the change of the terminus of the road or their general direction." It is observable that in this, the later expression of the legislative will, the corporation is not required to adhere to the points of the road described in its articles of association, and is restricted only to the *termini* of the road and its general direction. We think the fair construction of these several enactments, when taken together, authorizes the corporation to change the line and route of its road, to avoid obstacles and obtain the best route, at its discretion, except as to the general direction and the *termini* of the road, which may not be abandoned. If this view be correct, it is plain that the facts stated in the second paragraph of the answer do not constitute a defence to the cause of action stated in the complaint. *The Western Plank Road Co. v. Stockton*, 7 Ind. 500; *Steinmetz v. The Versailles and Osgood Turnpike Co.*, 57 Ind. 457.

8. At the trial, the court instructed the jury as follows:

“Gentlemen of the jury: Under the evidence before you, you should find for the plaintiff for the amount of the subscription, less any payments which may be proven, because, in my opinion, the variations proven are immaterial, and can not affect the right of plaintiff to recover.”

This was the only instruction given to the jury.

This instruction, if given as applicable to the evidence from which the jury were required to find the facts proved in the case, would have been wrong; but if given as applicable to facts stated in written instruments, or as to the legal effect of facts not in dispute, it would not be erroneous. It is within the power, and is the duty, of the court to construe written instruments and instruct the jury as to their legal effect, and to judge whether there is any evidence before the jury tending to prove a fact in the case; and, when there is no evidence before a jury tending to prove such fact, it is the right of the court to so instruct the jury. But, when there is evidence before the jury tending to prove a fact in the case, the court has no right to instruct them what it proves, or does not prove, nor as to its weight. The evidence in this case is in the record. We have examined it carefully, and are unable to find any that tends to prove a defence to the subscription of stock sued for in the complaint. The evidence which made the appellants liable on their subscription was contained in written instruments, and was all before the jury; and, there being no evidence tending to prove a defence, the court did not err in giving the instruction complained of. *Hynds v. Hays*, 25 Ind. 31; *Steinmetz v. Wingate*, 42 Ind. 574; *Dodge v. Gaylord*, 53 Ind. 365; *Moss v. The Witness Printing Co.*, 64 Ind. 125.

4. It sufficiently appears already, that, in our opinion, the evidence sustains the verdict. This question, therefore, need not be any farther examined.

Dye et al. v. Davis.

The judgment is affirmed, at the costs of the appellant, with five per cent. damages.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

DYE ET AL. v. DAVIS.

PARTITION.—*Complaint by Widower of Ancestor's Intestate Daughter.*—A complaint for partition alleged, that a certain intestate had died seized in fee-simple of certain described real estate; that he left surviving him his widow and four children named, one of the latter being then the wife of the plaintiff; and that subsequently the plaintiff's wife had died intestate, without issue and without having parted with any of her interest in such real estate, and leaving the plaintiff as her widower.

Held, on demurrer, that, for want of an averment either that the plaintiff's deceased wife's mother did not survive her, or that the value of all her property, real and personal, at the time of her death, did not exceed one thousand dollars, the complaint shows his interest to be but three-fourths of the real estate inherited by her.

SAME.—*Abandonment of Wife.*—*Witness.*—*Conversation with Wife.*—The widow and other children of such ancestor having answered alleging that the plaintiff had forfeited his interest in his wife's estate, under section 34 of the statute of descents, 1 R. S. 1876, p. 414, by abandoning her, etc., he was not competent to testify, as a witness in his own behalf, to a conversation had between himself and his deceased wife, in her lifetime, tending to show that he had not abandoned her.

PRACTICE.—*Motion for New Trial.* *Admission of Improper Evidence.*—A motion for a new trial, on the ground of the admission of incompetent evidence, should clearly designate the evidence complained of.

From the Hancock Circuit Court.

J. A. New, I. P. Poulson, A. Blair, E. P. Ferris and W. W. Spencer, for appellants.

W. R. Hough, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellants, to obtain the partition of certain real estate.

In his complaint, the appellee alleged, in substance, that,

Dye et al. v. Davis.

on the 23d day of September, 1873, one William H. Dye died intestate, and was, at and before his death, the owner, and seized in fee-simple, of certain lands and town lots, particularly described, in Hancock county, Indiana; that the said William H. Dye, at his death, left surviving him the appellant Lusetta Dye, as his widow, and William H. Dye, Jr., Mary Davis, then the wife of the appellee, Jane Dye and Frank Dye, as his only children and heirs at law; that afterward, on the 10th day of July, 1876, the said Mary Davis, the wife of the appellee, died at said county intestate, without issue and without having parted with any of her interest in said real estate inherited by her as one of the children and heirs of said William H. Dye, deceased, and leaving the appellee as her surviving husband; that the appellant Lusetta Dye was entitled to the undivided one-third part of all said real estate, according to its value, and that the appellants, William H. Dye, Jr., Jane Dye and Frank Dye, and the appellee, were each entitled to an undivided one-fourth part of the undivided two-thirds part of said real estate, according to its value, each and all in fee-simple. Wherefore the appellee demanded judgment for partition, etc.

After process was personally served on each of the appellants, upon a suggestion that the said Jane and Frank Dye were infants, under the age of twenty-one years, the court appointed James A. New, Esq., their guardian *ad litem*. The appellants then demurred to the appellee's complaint, for the want of sufficient facts therein to constitute a cause of action, which demurrer was overruled, and they excepted to this decision.

The appellants answered in four paragraphs, the first of which was a general denial, and to the second, third and fourth paragraphs of said answer, the appellee replied by a general denial.

The issues joined were submitted to a jury, and during

Dye et al. v. Davis.

the progress of the trial, "by agreement of the parties and said guardian *ad litem*, now here made in open court, this cause is now here withdrawn from the jury, except as to the issues joined herein by the second paragraph of the answer" to appellee's complaint and the appellee's reply thereto; "and that, upon the issue so formed as aforesaid, the jury shall only be required to make a special finding, in answer to the following interrogatory, to wit: Did the plaintiff, William H. Davis, abandon his wife without just cause, and fail to make suitable provision for her? And that upon the evidence and said interrogatory, and the answer of the jury thereto, this cause shall be and is now here submitted to the court for finding, judgment and decree."

The jury afterward returned into court their answer to said interrogatory, signed by their foreman, as follows: "He did not."

Upon this special finding of the jury, and the evidence given in the cause, the court found for the appellee, that he was the owner, in fee-simple, of an undivided one-eighth part of said real estate, and finding also the shares of the appellants, respectively, in said real estate, and that partition ought to be made between the parties, according to their shares in said real estate, as found by the court. Judgment of partition was rendered by the court, in accordance with its finding, and an interlocutory order was made, appointing commissioners to make such partition, and to report their proceedings to the court.

The appellants moved the court for a new trial, which motion was overruled, and to this decision they excepted. At the next term of the court the commissioners made their report of partition, which was approved and confirmed, and final judgment rendered thereon, to all of which the appellants at the time excepted.

In this court, the appellants have assigned, as errors, the following decisions of the court below:

Dye et al. v. Davis.

1. In overruling their demurrer to appellee's complaint ;
2. In overruling their motion for a new trial ;
3. In awarding judgment of partition ; and,
4. In confirming the report of the commissioners in partition.

It is claimed by the appellants' counsel, in their argument of this cause in this court, that the appellees' complaint did not state facts sufficient to show, either that he was the sole heir of his deceased wife, Mary Davis, or that he was otherwise entitled, under the law of descents, to the entire share of his deceased wife in the real estate described in the complaint. Because the appellee did not allege these facts, it is insisted by counsel, that the appellant's demurrer to his complaint ought to have been sustained. The appellee alleged, that his wife, Mary Davis, inherited from her deceased father an undivided one-sixth part of the real estate in controversy, and that afterward, at her death, as her surviving husband, he became entitled by descent to her entire share of said real estate. For the purpose of showing, that, as surviving husband, he was entitled to the full share of his deceased wife, Mary Davis, in said real estate, the appellee should have alleged in his complaint, in addition to the facts therein stated, either that his deceased wife, at her death, left no mother living, or that the whole amount of property, real and personal, of which his deceased wife was seized and possessed at her death, did not exceed one thousand dollars. 1 R. S. 1876, pp. 412, 413, secs. 25, 26.

It was alleged in the complaint, that the father of Mary Davis, deceased, William H. Dye, Sr., left, at his death, the appellant Lusetta Dye, as his widow ; but it does not follow, as a necessary inference from the fact thus alleged, that said Lusetta Dye was the mother of said Mary Davis, deceased. There was no allegation in the complaint, as to whether the said Mary Davis did, or did not, leave her

Dye et al. v. Davis.

mother surviving her, and none whatever as to whether the whole amount of her property, real and personal, did or did not exceed one thousand dollars. It is clear, therefore, that the facts stated in the complaint were not sufficient to show conclusively, that the appellee, as the surviving husband of Mary Davis, deceased, was entitled, by descent, to her full share of said real estate. But, while this is so, it is equally clear, we think, that the facts stated were amply sufficient to show, that, as such surviving husband, the appellee was entitled, under said section 25 of "An act regulating descents and the apportionment of estates," approved May 14th, 1852, *supra*, to at least three-fourths of the share of his deceased wife, Mary Davis, in said real estate. To this extent, the complaint stated facts sufficient to constitute a cause of action in favor of the appellee, and the demurrer thereto was correctly overruled.

The second alleged error, complained of by the appellants, was the decision of the court in overruling his motion for a new trial. In this motion, many causes for such new trial, consisting chiefly of alleged errors of law occurring at the trial and excepted to, were assigned by the appellants. Before considering any of these alleged errors of law, we may properly state, more fully than we have hitherto done, the principal issue for trial, in this cause. This issue was joined, as we have seen, on the second paragraph of the appellants' answer, by the appellee's reply in denial thereof. In this second paragraph of answer, the appellants alleged, in substance, that they admitted that said Mary Davis, the deceased wife of the appellee, was a child and heir at law of William H. Dye, deceased, and that she died at Hancock county, Indiana, intestate and without issue or their descendants alive, and that said appellee was the surviving husband of said Mary Davis, deceased; but they averred, that heretofore, to wit, on the

Dye et al. v. Davis.

3d day of January, 1876, the appellee, the husband of said Mary Davis, deceased, without any cause or provocation whatever, abandoned her, his said wife, leaving her in a destitute and helpless condition, and went to parts unknown, and remained away from his said wife, and away from the family of said decedent, continually, until a long time after her death and burial, which occurred as aforesaid, on the 10th day of July, 1876; and that the appellee did not make, or cause to be made, suitable provision for her, his said wife, before the time he abandoned her as aforesaid, and did not at any time, or in any manner, make for her, or afford to her, any provision for her maintenance, care of her support, after said 3d day of January, 1876, when he so abandoned her.

It is evident, that this paragraph of answer was prepared to make the case provided for in section 34 of the act regulating descents, etc., which section reads, as follows:

“SEC. 34. If a husband shall abandon his wife without just cause, failing to make suitable provision for her, or for his children, if any, by her, he shall take no part of her estate.” 1 R. S. 1876, p. 414.

We come now to the consideration of the alleged errors of law, occurring at the trial and excepted to, and complained of in argument, by the appellants' attorneys in this court. The sixth cause for a new trial, assigned by the appellants in their motion therefor, was as follows:

“6th. Because the court erred in permitting plaintiff, whilst testifying as a witness in said cause, over defendants' objections, to give in evidence a certain conversation between him, plaintiff, and his said wife, at the house of Lusetta Dye.”

The appellee's counsel has objected, in this court, to this sixth cause for a new trial, upon the ground that it did not “point out and specify the evidence, admitted over appellants' objections, with sufficient particularity, to enable the

Dye et al. v. Davis.

court below to have readily understood what the evidence referred to was." It is a rule of practice, firmly established by many decisions of this court, that where a party relies upon the admission of incompetent evidence, as a cause for a new trial, he must point out and specify, in his motion therefor, the incompetent evidence referred to, with such reasonable certainty and particularity as that the court, to which the motion is addressed, will readily know and understand what evidence is referred to. Buskirk Practice, pp. 244 to 246, and cases there cited. We do not think, however, that the objection of counsel is well taken to this sixth cause for a new trial; for it seems to us that it does not violate, nor even collide with, the rule of practice above stated. It designated and pointed out the particular evidence, complained of by the appellants as incompetent, by specifying the appellee as the witness, the evidence complained of as an alleged conversation between the witness and his wife, and the place where such conversation occurred as the house of Lusetta Dye. We are of the opinion, that the appellants specified and pointed out, in their sixth cause for a new trial, the evidence of the appellee, admitted over their objections, with such reasonable clearness and certainty as that the court might readily know and understand what evidence was referred to.

It appears from the record, that while the appellee was on the stand, as a witness in his own behalf, on the trial of the cause, he was asked to state the conversation between him and his wife, at the house of Mrs. Lusetta Dye, to which the appellants "objected, on the ground that the conversation sought to be admitted in evidence was a conversation between husband and wife, and that husband and wife can not disclose any communication from one to the other, made during the existence of the marital relation." This objection was overruled by the court, and to this ruling the appellants excepted; and the appellee was permitted to testify as follows:

"I went into the room; Mrs. Dye went out of the room; and then my wife said to me: 'Henry, my folks don't want you to come here. I don't know what is the matter with them; they seem mad at you; you had better go away somewhere, and get work either at Indianapolis or Greenfield, where you can be near about, if any thing should happen that I should need you.' I told her I would go to my sister's, and she agreed to it; said she: 'When I get better, I'll come to you.'"

It will be readily seen, that the evidence thus admitted over the appellants' objections was material to the issues then on trial, as its tendency was to show that the appellee had not abandoned his deceased wife, Mary Davis, but, on the contrary, he had left her temporarily, with her consent.

In section 2 of "An act defining who shall be competent witnesses in any court or judicial proceeding in this State," etc., approved March 11th, 1867, it is provided, *inter alia*, that, "husband and wife, * * * as to communications made to each during marriage, * * * shall not in any case be competent witnesses, unless with the consent of party making such confidential communication." 2 R. S. 1876, p. 133. It needs no argument, we think, to show, that, under this statutory provision, the court erred in overruling the appellants' objections to the appellee's evidence in regard to the conversation between him and his deceased wife, Mary Davis. The evidence objected to by the appellants, and admitted by the court over their objections, was a communication made to the appellee by and from his deceased wife, Mary Davis, during the existence of the marriage relation between them, and as such it came fairly within the letter and meaning of the statute. The evidence of the appellee was incompetent, and the court erred, we think, in its admission.

The appellants also assigned as causes for a new trial, in

McClure v. McClure.

their motion therefor, other alleged errors of law occurring at the trial, and excepted to, in the admission of other evidence by the court over their objections, and in giving and refusing to give certain instructions. The record of the cause is defective, in this, that it does not contain all the evidence given on the trial; nor does it show on its face that it contains all the instructions of the court to the jury. For these reasons, we find it difficult to determine the other questions presented and discussed by the appellants' counsel, in their brief of this cause. Those questions, if they arise again, will probably be presented on a new trial of the case more fully and fairly than they have been presented in the record now before us. Our conclusion is, that the court erred in overruling the appellants' motion for a new trial.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

McCLURE v. McCLURE.

65 482
154 315

COVENANT.—*Warranty.—Complaint against Remote Grantor.—Possession.—Covenant Running with Land.—Eviction.*—In an action against a remote grantor, for a breach of the covenants contained in a deed of conveyance, in the statutory form, of certain real estate, the complaint alleged, that, for a certain money consideration, by a deed made part of the complaint by copy, the defendant had attempted to convey to one who, in like manner, had attempted to convey to the plaintiff; that the defendant, when he executed such deed, had no title; that, while the plaintiff was in possession under the deed from his immediate grantor, the holder of the paramount title had instituted an action in the proper court, against this plaintiff, and his immediate grantor and this defendant, resulting in a judgment of evis-

McClure v. McClure.

tion, against all such defendants ; and that this plaintiff had thereupon, to avoid dispossession by legal process, surrendered to the paramount title by becoming the tenant of the holder thereof, and had since surrendered possession to him.

Held, on demurrer, that, under section 12, 1 R. S. 1876, p. 364, such deed contained a covenant of general warranty, running with the land, and, therefore, that the complaint was sufficient without an averment that the defendant was in possession when he executed the deed in question.

Held, also, that a surrender of possession to the paramount holder's attorney in such action was a legal eviction.

SAME.—Defence.—Former Recovery, against Immediate Grantor.—An answer in such action, alleging a former recovery by the plaintiff in an action against his immediate grantor, is insufficient.

SAME.—Remedy.—Joint or Several Actions.—The grantee, in such case, may maintain an action against each grantor separately, on his own covenants, or against both jointly.

SAME.—Satisfaction of Judgment.—If separate judgments be recovered, a satisfaction of one would operate, *pro tanto*, as a satisfaction of the other.

SAME.—Measure of Damages.—Consideration Expressed in Deed.—Title-Bond.—It appearing by the evidence that the defendant had sold the land to a third person, by a title-bond, for a certain sum, that the latter had sold the land, and assigned his bond, to the defendant's grantee, at an advance, and that, in the defendant's deed, the consideration expressed was the sum so paid by his grantee, the plaintiff was entitled to recover for the latter sum, with interest from the date of the deed.

From the Montgomery Circuit Court.

G. D. Hurley and *B. Crane*, for appellant.

J. McCabe, for appellee.

WORDEN, C. J.—Action by the appellee, against the appellant, upon the covenants of a deed.

Judgment for the plaintiff.

It appears by the complaint, that the appellant and his wife, for the consideration of five hundred and seventy-five dollars, conveyed and warranted, in the statutory form, certain real estate in the county of Montgomery, to William Holland. A copy of the deed is made a part of the complaint. Holland and his wife, in like manner, conveyed the property to the plaintiff, the appellee herein.

The action was thus brought by the plaintiff, against his remote grantor, David F. McClure.

McClure v. McClure.

The breach of covenant is alleged in the complaint as follows :

“And the plaintiff took possession of said real estate pursuant to said purchase. He further avers, that, at the time of the execution of said first mentioned deed, David F. McClure was not the owner of said real estate, but the paramount title in and to said real estate was then in one Louisa J. Bunch, since intermarried with Thomas Taylor; that the said David F. McClure has not kept and performed his said covenants in said deed contained, but, on the contrary thereof, has broken the same in this, to wit, that, since, Louisa J. Taylor brought action of ejectment against the plaintiff, the defendant, David F. McClure, and wife, and William Holland and wife, in this court, on the — day of —, 1866, in which she successfully asserted her paramount title, as against the title attempted to be conveyed by said deed first mentioned ; and, on the — day of —, 1868, she recovered a judgment of eviction, against all the defendants in said action ; and thereupon, to prevent expulsion by force of legal process, he surrendered to the paramount title and became the tenant of said Louisa, and since surrendered the possession of the premises to the holder of said paramount title, and thus the plaintiff has been evicted from the said premises, so that he has wholly lost them,” etc.

A demurrer to the complaint, for want of sufficient facts, was overruled, and the ruling is assigned for error.

The point made on the complaint is this : That, as the complaint does not show that the defendant had possession of the premises at the time of his deed to Holland, and does not show that he put Holland in possession, in pursuance of his purchase, the covenants in the deed were mere personal covenants not running with the land, and were broken as soon as executed ; and, therefore, that the plaintiff could not sue upon them.

For the purposes of this case, it may be conceded, that the covenant of seizin, when the grantor is not in possession and does not put his grantee in possession of the premises, if broken, is broken at once, upon the execution of the deed, and does not run with the land; and, hence, that a remote grantee can not sue upon it. See *Bethell v. Bethell*, 54 Ind. 428; *Craig v. Donovan*, 63 Ind. 513.

But the deed in question embraces other covenants than that of seizin. A deed, substantially in the statutory form, like that in question, by which a party "conveys and warrants" to another the real estate, "shall be deemed and held to be a conveyance in fee-simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all encumbrances, and that he will warrant and defend the title to the same against all lawful claims." 1 R. S. 1876, p. 364, sec. 12.

It is thus seen that the deed in question contained, amongst other things, a covenant of general warranty; and this covenant, beyond all doubt, runs with the land.

Says Chancellor KENT: "The covenant of warranty, and the covenant for quiet enjoyment, are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are, therefore, in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees of the purchaser." 4 Kent Com., 12th ed., top p. 471. See, also, *Blair v. Allen*, 55 Ind. 409.

The breach assigned in the complaint was a breach of the covenant of warranty.

The objection to the complaint was not well taken.

The defendant's second paragraph of answer alleged, in

McClure v. McClure.

substance, that in May, 1874, the plaintiff recovered, in the Montgomery Circuit Court, a judgment against the said William Holland, his grantor, for two thousand dollars for the identical cause of action embraced in this suit, which judgment is in full force, etc.

A demurrer, for want of sufficient facts, was sustained to this paragraph of answer, and in this ruling we think no error was committed.

We suppose the identity of the two causes of action should be regarded as being confined to the loss by the plaintiff of the property.

The pleader evidently did not mean to allege that the plaintiff had recovered a judgment against Holland for the breach of the covenants entered into by the defendant, McClure. We construe the answer as alleging a recovery by the plaintiff, against Holland, for the breach of Holland's covenants, and not for a breach of McClure's.

The plaintiff had a right to sue Holland, his immediate grantor, for a breach of his covenants, or the defendant, his remote grantor, for a breach of his covenants, or both of them; and a recovery of a judgment against one, without satisfaction, would not bar an action against the other. A satisfaction of one judgment would probably operate, *pro tanto*, as a satisfaction of the other. For analogous cases see *The First National Bank of Indianapolis v. The Indianapolis Piano Manufacturing Co.*, 45 Ind. 5; *Morrison v. Fishel*, 64 Ind. 177.

A motion for a new trial was made on the ground, among other things, that the damages were excessive. It is claimed, indeed, that nothing but nominal damages could be recovered, because the plaintiff was not legally evicted.

The record of the recovery against the plaintiff was given in evidence; and it was sufficiently proved that the plaintiff surrendered the possession of the property to the

McClure v. McClure.

attorney of Mrs. Taylor, who appeared for her in the action, in pursuance of the judgment, without coercive process. This we think was a legal eviction, and entitled the plaintiff to full damages. *Black v. Duncan*, 60 Ind. 522.

The measure of damages adopted was the purchase-money as expressed in the deed, and the interest thereon from the date of the deed up to the time of rendering judgment. The amount of the purchase-money expressed in the deed will be regarded as the true amount, in the absence of any showing to the contrary, and the measure of damages adopted was the correct measure. *Sheets v. Andrews*, 2 Blackf. 274; *Reese v. McQuilkin*, 7 Ind. 450; *Phillips v. Reichert*, 17 Ind. 120; *Burton v. Reeds*, 20 Ind. 87. "The uniform rule is," says Chancellor KENT, "to allow the consideration money with interest and costs, and no more." 4 Kent Com. 476.

But it is claimed, in the brief of counsel for the appellant, that he sold the lot by title-bond, to one Vancouver, for four hundred and fifty dollars, and that Vancouver sold it to Holland, for five hundred and seventy-five dollars, and the appellant made his deed directly to Holland; hence it is claimed that the four hundred and fifty dollars should be made the basis of the calculation. It seems to us, however, that, as Holland paid five hundred and seventy-five dollars for the property, and has the appellant's covenant of warranty, he would be entitled to recover that sum, with the interest thereon, and the plaintiff stands in Holland's shoes in this respect.

There is no error in the record.

The judgment below is affirmed, with costs.

Petition for a rehearing overruled.

Miller *et al.* v. Arnold.

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MILLER ET AL. v. ARNOLD.

PRINCIPAL AND SURETY.—*Extension of Time.*—An agreement between the holder and principal, for an extension of the time of payment of a promissory note, indefinitely, on payment of the interest, will not discharge the surety.

SAME.—*Verbal Agreement to Sue.*—A violation by the holder, of a verbal agreement with the surety to at once sue the principal, will not discharge the surety.

SUPREME COURT.—*Practice.*—*Appeal without Notice to Co-Party.*—*Assignment of Errors.*—*Dismissal of.*—A judgment having been rendered against a principal and surety jointly, the latter, without giving notice to the former, appealed to the Supreme Court and assigned errors in the names of both, whereupon the principal, by affidavit denying notice of the appeal, moved to strike from the record his name and pretended assignment of errors.

Held, that the motion should be sustained, but that that does not affect the surety's appeal.

From the Shelby Circuit Court.

A. Major and S. Major, for appellants.

B. F. Love, for appellee.

PERKINS, J.—Mary Arnold sued the makers thereof upon a promissory note, in terms as follows:

“\$1,000. July 29th, 1873.

“Twelve months after date we promise to pay to the order of Mary Arnold, negotiable and payable at the First National Bank of Shelbyville, Indiana, one thousand dollars, with interest at the rate of ten per cent. per annum from date, and with attorney's fees if suit be instituted on this note. Value received, without any relief from valuation or appraisal. The drawers and endorsers severally waive presentment for payment, and notice of protest for non-payment of this note. BENNETT POWELL,

“WILLIAM MILLER, Security.”

Powell answered. He is not a party to this appeal.

Miller answered as follows, viz.: That he signed said note as surety for said Powell; that he received no part of the consideration therefor, of which the plaintiff had no-

tice ; that, after said note became due, said Miller verbally requested said plaintiff, then the holder of said note, to sue upon and collect said note, which she promised to do ; that said Miller, relying on said promise, omitted to give said plaintiff written notice to sue, and rested in the belief that suit had been instituted ; that said Powell was then good and able to pay ; that said plaintiff did not institute any suit prior to the present suit, but fraudulently, and without the knowledge of said Miller, agreed to give said Powell time indefinitely for the payment of the principal of said note, if he, said Powell, would promptly pay the interest thereon, as from time to time it should become due, which said Powell promised to do ; that said plaintiff did forbear, etc., without the knowledge of said Miller ; that, had suit been instituted on the note against said Powell, the money due on said note could have been collected, etc. Wherefore said Miller says he is discharged, and the plaintiff estopped to sue him on said note. The answer does not allege that Miller informed Mrs. Arnold that he would no longer remain as surety on the note.

A demurrer was sustained to this answer, and exception entered. Said Miller refused to answer further, and judgment was rendered against both defendants. No exception was taken to the judgment, and no motion made to modify it.

A transcript of the record of the cause was filed in this court and errors assigned in the name of both the defendants below, as follows :

1. The court erred in sustaining the demurrer to said Miller's answer ;
2. The court erred in rendering judgment for said Mary Arnold, against said Miller ;
3. The court erred in rendering judgment against said Powell.

On the 12th of August, 1878, Powell filed in the office of the clerk of the Supreme Court the following affidavit :

Miller *et al.* v. Arnold.

"Comes now said Bennett Powell, and shows to the court that he is the identical Bennett Powell who is joined as an appellant in this cause; that such joinder and use of his name as an appellant are without his authority or consent; that he hereby refuses to join as one of the appellants in this cause; that he had no notice or knowledge of such joinder until his attention was called to the record this day, nor had he any knowledge, until this day, that said cause had been appealed to the Supreme Court of the State of Indiana. He also shows that Major and Major are not his attorneys, and were not, in the court below. Wherefore he moves the court to strike his name and his pretended assignment of errors from the record as an appellant.

BENNETT POWELL."

The above was duly verified.

Under this affidavit the name of Bennett Powell will be regarded as struck from the record. See 2 R. S. 1876, p. 239, sec. 551, *noté a*.

This does not affect the appeal of Miller.

As no exception was taken to the judgment below, it only remains to consider the first assignment of error, viz., that the court erred in sustaining the demurrer to the answer of Miller.

The court did not err in sustaining said demurrer.

The following propositions are settled law in this State, on the subject of principal and surety:

1. Mere delay in proceeding to collect the debt, where time is not given by a binding agreement, does not discharge the surety. *Kirby v. Studebaker*, 15 Ind. 45.

2. The giving of time to the principal, for the payment of the debt, in order to discharge the surety, must be for a definite time, and upon a valuable consideration. *Tracy v. Quillen*, *ante*, p. 249; *Huff v. Cole*, 45 Ind. 300; *Abel v. Alexander*, 45 Ind. 523; *Chrisman v. Tuttle*, 59 Ind. 155; *Brooks v. Allen*, 62 Ind. 401.

3. A verbal request by the surety, to the holder of a note, to enforce its payment by suit against the principal, is unavailing to discharge such surety, when disregarded by such holder. *Carr v. Howard*, 8 Blackf. 190; *Colerick v. McCleas*, 9 Ind. 245; *Overturf v. Martin*, 2 Ind. 507; *Halstead v. Brown*, 17 Ind. 202, and cases cited; *Chrisman v. Tuttle*, *supra*.

4. The payee of a note may release a surety by surrendering securities placed in his hands by the principal. *Holland v. Johnson*, 51 Ind. 346.

At law the surety could not take any steps to compel the creditor to proceed to collect or secure his claim against the principal. *Halstead v. Brown*, 17 Ind. 202; *Pierce v. Goldsberry*, 31 Ind. 52.

Chapcery first gave this right, by sustaining bills in that court to enforce it, provided the surety would indemnify the creditor against loss, should the suit prove fruitless. *Brandt Suretyship & Guaranty*, sec. 205.

The next step was to hold that the surety might be discharged, by giving notice to the creditor to sue. *Brandt, supra*, sec. 206.

But "The great majority of cases on the subject hold, in the absence of any statutory provision, that if after the debt is due the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal, he may himself pay the debt, and immediately sue the principal. The contrary doctrine is an innovation, and was unknown to the common law." *Brandt, supra*, sec. 208.

Stultz *et al.* v. The State, *ex rel.* Steele, Prosecuting Attorney.

In this State, we have a statute providing for written notice. 2 R. S. 1876, p. 276.

It is conceded that there is a minority of cases on the subject, which hold that a surety, by verbal request, may, compel the creditor to proceed by suit against the principal. Brandt, *supra*, sec. 206. But that writer observes, that the notice, whether verbal or written, "should be so clear and distinct that the meaning of the surety can be at once apprehended without explanation or argument;" that "It has been held that the request to sue must be accompanied by an explicit declaration that unless suit is brought the surety will no longer remain liable." See, on this point, *Kaufman v. Wilson*, 29 Ind. 504.

No such notice was given in this case; and it is not necessary that we should express an opinion as to its materiality.

The judgment is affirmed, with costs.

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STULTZ ET AL. v. THE STATE, EX REL. STEELE, PROSECUTING ATTORNEY.

JUDICIAL NOTICE.—*Statutes and History of the State.—Population of Cities.*

—The courts of this State take judicial notice of its statutes, and also of its history, which includes the population of its cities and towns as shown by the last census of the United States.

SAME.—*Town and City of Huntington.*—The courts of this State take judicial notice that, from the 16th day of February, 1848, until the 7th day of March, 1873, Huntington, the county-seat of Huntington county in this State, was an incorporated town under a special charter, and that, after the latter date, such municipality incorporated under the general law of this State, as "The City of Huntington."

CITY.—*Information Against.—Quo Warranto.—Persons Assuming to Act as City Officers.—Remedy.—Injunction.*—An information in the name of the

Stultz *et al.* v The State *ex rel.* Steele, Prosecuting Attorney.

State, on the relation of a prosecuting attorney, against certain persons therein named, as the "pretended officers of" a certain "so-called city," alleged that the defendants were assuming to act as the mayor, common councilmen, marshal, treasurer and clerk of such city; that they, without any warrant, charter or grant were exercising, and claimed the right to exercise, over the inhabitants and property within certain described territory, certain corporate liberties, privileges and franchises, such as are exercised by the officers of a lawfully incorporated city, in levying and collecting city taxes, issuing city bonds, controlling streets, highways and bridges, regulating the public property and markets, establishing and regulating a fire department and public police, and otherwise acting as such officers; and that such corporate liberties, privileges and franchises had been, and still were, usurped by the defendants and each of them.

Held, on demurrer, the contrary not being alleged, that such city was lawfully incorporated, and that the presumption is that the defendants had been lawfully elected as such officers, and that the information is not authorized by section 749 of the code.

Held, also, that injunction is the proper remedy to prevent such officers from exercising such powers outside the city limits.

SAME.—*Annexation to City.*—The legality of the annexation of territory to a city can not be questioned by such an information.

From the Huntington Circuit Court.

B. F. Ibach, B. M. Cobb, S. H. Buskirk and J. W. Nichol,
for appellants.

L. M. Ninde, A. Zollars, F. T. Zollars and T. G. Smith,
for the State.

Howk, C. J.—In this action, the State of Indiana, on the relation of the prosecuting attorney of the Twenty-Eighth Judicial Circuit, filed an information in three paragraphs, in the nature of a *quo warranto*, against the appellants, as the "pretended officers of the so-called City of Huntington."

The appellants jointly demurred to the entire information, upon the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, and to this decision they jointly excepted.

The appellants then jointly answered in five paragraphs, to each of which paragraphs the appellee, by its relator, demurred, upon the ground that it did not state facts suffi-

Stultz et al. v. The State, ex rel. Steele, Prosecuting Attorney.

cient to constitute a defence to the information. The court sustained the demurrer to each paragraph of said answer, and to these decisions the appellants excepted. Thereupon the appellants refused to answer further, or to amend their answer, and the court rendered judgment on the demurrer, in favor of the appellee, as prayed for in the information, and the defendants appealed therefrom to this court.

Errors have been assigned by the appellants, in this court, which call in question, and present for our consideration and decision, the sufficiency of the facts stated in each paragraph of the information to constitute a cause of action, and the sufficiency of the facts stated in each paragraph of the appellants' answer to constitute a defence to the appellee's information.

We will first consider and decide the questions presented by the alleged error of the court below, in overruling the appellant's demurrer to the appellee's information. As we have said, there were three paragraphs in this information. In each of these paragraphs, it was alleged that the appellants, as the pretended officers of the so-called city of Huntington, were using, and claimed the right to use, without any warrant, charter or grant therefor, certain corporate liberties, privileges and franchises, particularly specified, over certain real estate or territory, particularly described, in Huntington county, Indiana. Herein lies the only material difference between the three paragraphs, that the real estate or territory, described in each paragraph, is different from the real estate or territory described in each of the other two paragraphs. Therefore, in considering the sufficiency of the information, under the demurrer thereto for the alleged want of sufficient facts, we need only to notice the allegations of one of the paragraphs, for, if one of the paragraphs was sufficient, then the others were also sufficient, and if one was bad on demurrer, so also were the other paragraphs.

Stultz et al. v. The State, ex rel. Steele, Prosecuting Attorney.

Omitting the description of the real estate or territory found therein, we set out the first paragraph of the information, as follows :

“Asbury E. Steel, Prosecuting Attorney for the 28th Judicial Circuit of the State of Indiana, comes here into the circuit court of the county of Huntington, in the State of Indiana, according to the form of the statute in such cases made and provided, and upon his own relation gives the court to understand and be informed that George W. Stultz, Patrick O'Brien, Leon T. Bagley, William P. Beeber, William A. Berry, Henry W. Rosebrough, George Gray, Cyrus E. Bryant, William J. Campbell and Theodore Shaffer, for the space of one year last past and more, have used and do use, without any warrant, charter or grant, the following liberties, privileges and franchises, to wit, that of apportioning into wards for a city the following territory, to wit,” (we omit the description) “and exercising the powers of a city government, and the rights, powers, privileges and franchises over said territory and every part thereof, which the mayor, common councilmen, treasurer, clerk and marshal of cities have, possess, and employ and legally exercise over territory duly incorporated under the general laws of the State of Indiana, approved March 14th, 1867, and the amendments thereto. That said defendants, during said period, have unlawfully, and without any warrant or authority of law whatever, claimed, held, used and exercised, over said territory and the inhabitants thereof, to wit : That of the providing and using a corporate seal around the margin of which is inscribed ‘The City of Huntington, Indiana ;’ that of levying and causing to be assessed on and collected off and from the real and personal property situate in said territory, and on, off and from the inhabitants thereof, such taxes, in such amounts and for such pretended purposes as the duly organized city government, and officers duly elected hereunder, of right might do ; and they, the

Stultz et al. v. The State, ex rel. Steele, Prosecuting Attorney.

defendants, have, for the period aforesaid, without warrant, charter or authority of law, claimed and exercised the right, privilege and franchise of levying upon, seizing and selling the property, real and personal, within said territory, under and by authority of such unlawful assessment and levy of said taxes, and the proceeds of said sales to apply to the payment of such unlawful taxes; that of fixing the amount and rate of said taxes, and of unlawfully collecting the same off and from the property and inhabitants within said territory, and also that of borrowing money and issuing bonds therefor, in the form and similitude of proper corporate bonds of the City of Huntington; that of exercising exclusive power over the streets, highways and bridges within said territory described as aforesaid, and ordering and requiring the same to be improved, repaired, opened, changed, widened, and otherwise altered, and the sidewalks and crossings to be constructed and established, and the expense and cost thereof to be assessed, levied upon and collected upon and off the lots and property adjoining such streets and sidewalks so improved, constructed, opened, widened and established. That said defendants, for the period of time aforesaid, have also used and do use, without any warrant, charter or grant, the liberties, privileges and franchises of regulating the management of the public property, markets and market squares, and the sales of meat, fish and vegetables; to regulate the selling, weighing and measuring of hay, wood, coal and other articles within said territory. That said defendants, without any warrant or authority of law whatever, during said period, have exercised the liberty, privileges and franchise of organizing and establishing a fire department within the limits of said territory, and of appointing fire wardens, and of entering into, themselves or by their agents, all houses, dwellings and out-houses, lots and yards, etc., and viewing the same, and regulating the construction of chimneys, hearths, ovens, and the erection of

Stultz *et al.* v. The State, *ex rel.* Steele, Prosecuting Attorney.

stove pipes, and the right to procure fire engines and the apparatus for the extinguishment of fires. That said defendants, without any warrant, charter or authority of law whatever have, during said period, exercised the rights, privileges and franchises of appointing, establishing and regulating a police force, and have removed the members of such police force at their discretion; and to regulate, fix and establish the salaries of the members of such police force. And said defendants, without any warrant, charter or authority of law, for the period aforesaid, have exercised the right, privilege and franchise of acting as common councilmen, mayor, clerk, treasurer and marshal within and throughout the limits of said territory, and of making and enforcing by-laws and ordinances therein and for the government thereof, and of arresting, prosecuting and trying the citizens living within said territory for the disregarding of said ordinances and by-laws, as other mayors, common councilmen, clerks, treasurers and marshals of cities duly organized under the general laws of this State providing for the organization of cities, may of right exercise, do, enact and enforce, and arrest, try and punish. And said defendants, without any warrant or charter as aforesaid, during the period aforesaid, and within the territory aforesaid, have done, and still claim the right to do, all such other acts as mayors, common councilmen, clerks, treasurers and marshals of duly organized cities may of right do, exercise and perform by virtue of the powers granted to them by their respective charters or acts of incorporation, all of which liberties, privileges and franchises aforesaid the said defendants, and each of them, during all the time aforesaid, have usurped, and still do usurp, upon the said State of Indiana, to the great damage and prejudice of said State, and of the citizens thereof. Whereupon the said prosecuting attorney, on behalf of said State, upon his own relation, prays advice of said court in the premises, and due

Stultz et al. v. The State, ex rel. Steele, Prosecuting Attorney.

process of law against the said George W. Stultz, Patrick O'Brien, Leon T. Bagley, William P. Beeber, William A. Berry, Henry W. Rosebrough, George Gray, Cyrus E. Bryant, William J. Campbell and Theodore Shaffer in this behalf, be made to answer to said State of Indiana, by what warrant they claim to have, hold, enjoy and exercise the liberties, privileges and franchises aforesaid."

It will be observed, that there is no allegation in this paragraph of the appellee's information, which in any manner calls in question the fact, that there is a corporation in Huntington county, in this State, known by the corporate name of "The City of Huntington," nor the further fact, if it be the fact, that the appellants, when this suit was commenced, were the lawfully elected and acting officers, to wit, mayor, councilmen, clerk, treasurer and marshal, of said city of Huntington.

We know judicially, that Huntington, the county seat of Huntington county, in this State, was an incorporated town under a special charter, from the 16th day of February, 1848, until the 7th day of March, 1873; for this fact is shown by the public statutes of this State, of which we must take judicial notice. Acts 1873, p. 149; *Evans v. Browne*, 30 Ind. 514; *Turbeville v. The State*, 42 Ind. 490.

We know judicially, that, before the commencement of this suit, and subsequent to March 7th, 1873, the incorporated town of Huntington, having more than two thousand five hundred inhabitants, as shown by the last census of the United States, assumed to and did become an incorporated city by and in the corporate name of "The City of Huntington," under the provisions of the general law of this State providing for the incorporation of cities, approved March 14th, 1867. 1 R. S. 1876, p. 267; for this fact is shown by the history of the State, of which we take judicial notice. *Carr v. McCampbell*, 61 Ind. 97.

We assume, therefore, in this case, in the absence of any

Stultz *et al.* v. The State, *ex rel.* Steele, Prosecuting Attorney.

allegation to the contrary in the appellee's information, that the city of Huntington was and is duly and legally incorporated as a city, under and in accordance with the general law of this State for the incorporation of cities. We assume, also, the contrary not appearing, that the appellants were, when this suit was commenced, the lawfully elected and acting officers of said city of Huntington, to wit, the mayor, councilmen, clerk, treasurer and marshal thereof.

Informations in the nature of *quo warranto* proceedings are governed by the provisions of article 44 of the practice act. In section 749 of that act, it is provided as follows :

" Sec. 749. An information may be filed against any person or corporation in the following cases :

" *First.* When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or any franchise within this State, or any office in any corporation created by the authority of this State.

" *Second.* Whenever any public officer shall have done or suffered any act which, by the provisions of law shall work a forfeiture of his office.

" *Third.* Where any association or number of persons shall act within this State as a corporation, without being legally incorporated.

" *Fourth.* Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law." 2 R. S. 1876, p. 298.

The cases provided for, in the section quoted, are the only cases in which an information in the nature of a *quo warranto* may be filed against any person or corporation in this State. The question for decision, therefore, and the controlling question, as it seems to us, in this case, may be thus stated : Does the appellee's information state

Stultz et al. v. The State, ex rel. Steele, Prosecuting Attorney.

a case which comes fairly within the letter or the meaning of the section of the statute above quoted?

It is clear, we think, that the case made by the appellee's information is not authorized by either the second, third or fourth clauses of section 749, above quoted, of the practice act. Therefore, it seems to us, that, unless the information states a case against the appellants, fairly within the purview and meaning of the first clause of said section 749, it does not state facts sufficient to constitute a cause of action, and the appellants' demurrer thereto, for the want of sufficient facts, ought to have been sustained.

Does the appellee's information, by any of its allegations, show that the appellants, or either of them, had usurped, intruded into, or unlawfully held or exercised any public office, or any franchise within this State, or any office in any corporation, created by the authority of this State? This is really, as we think, the controlling question in this case. As preliminary to the consideration of this question, we ought, perhaps, to dispose of another question which, it may be said, either precedes, or at least underlies, the question last stated. We have said that it was alleged, in each paragraph of the appellee's information that the appellants were using, and claimed the right to use, certain alleged corporate or municipal powers over certain described real estate or territory. It was alleged that the appellants, without any warrant or charter therefor, had done and then claimed the right to do, within the described real estate or territory, all such acts as mayors, councilmen, clerks, treasurers and marshals of duly organized cities might of right do, exercise and perform, by virtue of the powers granted to them by their respective charters or acts of incorporation.

It will be observed, however, that it was not alleged in the information, that the appellants were not the lawfully elected and qualified mayor, councilmen, clerk, treasurer and marshal of a city, say of the City of Huntington, duly

Stultz *et al.* v. The State *ex rel.* Steele, Prosecuting Attorney.

organized and incorporated under the general laws of this State for the incorporation of cities. In the absence of such an allegation, it seems to us that we may fairly assume that the appellants were such officers of such an incorporated city, and that, as such officers, they might of right lawfully do, exercise and perform, within the limits of such city, all such acts as such officers were authorized by law to do, exercise and perform. If the appellants were such officers of such a city, it can not be said, we think, that the appellants, or either of them, had usurped, intruded into or unlawfully held or exercised their respective public offices, merely because they had done, and claimed the right to do, within the territory described in the information, all such acts as such officers, of duly organized cities, might of right do within the corporate limits of such cities, even though such territory may not have been within such city limits. It is not alleged, in either paragraph of the information, that the appellants had usurped, intruded into, or unlawfully held or exercised the public offices therein mentioned; but the allegation was, in each paragraph, that they had done, and then claimed the right to do, within the territory described therein, all such acts as the incumbents of such public offices, in duly organized cities, might of right do under the law. Our conclusion is, that the appellee's information does not state a case which is warranted or authorized by any of the provisions of section 749 of the practice act.

It is evident, we think, that the object of this suit was to obtain a judgment, declaring that the territory described in the information was not lawfully within the corporate limits of the City of Huntington. In our opinion, an information in the nature of a *quo warranto* will not lie to determine this question. If the territory described was not lawfully taken within, or annexed to, the town or city of Huntington, and if the appellants, as the officers of said city, unlawfully performed, and claimed the right to

Stultz *et al.* v. The State, *ex rel.* Steele, Prosecuting Attorney.

perform, official acts within or over such territory, their acts would be unauthorized and illegal, and they could be enjoined therefrom in a proper suit, brought for that purpose. But we are clearly of the opinion, that the legality of the proceedings, whereby the territory in question was taken within, or annexed to, the City of Huntington, can not be tried and determined, under the provisions of our code, in or by an information in the nature of a *quo warranto*. In High Extraordinary Remedies, section 618, it is said that, where a public officer threatens to exercise the functions of his office beyond its territorial limits, "the proper remedy would seem to be by injunction, rather than by a *quo warranto* information. Thus, the information will not lie to prevent the legally constituted authorities of a city from levying and collecting taxes beyond the city limits, under an act of the legislature extending the limits, and the constitutionality of such an act can not be determined upon a *quo warranto* information." This doctrine is fully sustained by the case, cited in the foot note of *The People, ex rel., v. Whitcomb*, 55 Ill. 172.

In section 617 of the same excellent treatise, the rule is laid down that a *quo warranto* information will not lie, where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil action. *The State, ex rel., v. Marlow*, 15 Ohio State, 114. "Nor is the rule, as here stated, limited to cases where the relief may be attained in the ordinary forms of common-law actions, but applies also to cases where the grievance may be redressed by bill in equity, and the existence of an adequate remedy in equity would seem to be a sufficient objection to entertaining proceedings by information." *The People, ex rel., v. Whitcomb, supra*; *The People, ex rel., v. Ridgley*, 21 Ill. 64.

This rule was recognized by this court, in the case of *The State, ex rel., v. Shields*, 56 Ind. 521, in which it

Stultz *et al.* v. The State, *ex rel.* Steele, Prosecuting Attorney.

was held, that a *quo warranto* information would not lie to determine the title to certain real estate, used for school purposes, as between two school corporations.

In section 589 of High Ex. Leg. Remedies, it is further said: "While the principles thus far established indicate the tendency to a somewhat liberal use of *quo warranto* informations, as a means of correcting the usurpation of corporate privileges, the courts will not entertain such informations for the purpose of interfering with or declaring void the legislative action of a municipal body, such as the common council of a city. The power of municipal legislation being properly vested in such a body, the courts will not permit the use of this remedy to inquire into or challenge the manner in which this power has been exercised, nor is it within the legitimate scope of the proceeding by information to declare null and void legislative acts of such a municipal body. Nor will the charter of a municipal corporation be forfeited by proceedings upon an information, because of the passage by the corporate authorities of an alleged illegal ordinance in which they have transcended their powers, the offence charged being at the most but an error of judgment, rather than a wilful abuse of power." *The State, ex rel., v. The City of Lyons*, 31 Iowa, 432; *The State, ex rel., v. Town Council of Cahaba*, 30 Ala. 66.

In the case of *The City of Peru v. Bearss*, 55 Ind. 576, which was a suit by the appellees, against the appellant, to enjoin the collection of certain taxes, assessed by the corporate authorities of the City of Peru on certain real estate, claimed by the appellees to have been illegally annexed to, and therefore not legally within, the said city, it was held by this court, in substance, that the only adequate remedy for persons aggrieved by such annexation was afforded by a suit, such as the one then before us, to enjoin the city authorities from assessing and collecting taxes on such illegally annexed territory, from the owners

 Ex Parte Wright.

thereof or the residents therein. The doctrine of the case cited has been approved and followed by this court, in the more recent case of *Windman v. The City of Vincennes*, 58 Ind. 480.

It may be said, and has been said by the learned counsel of the appellee, in this case, that the views expressed in this opinion are not applicable to the case, such as this, of a *quo warranto* information by the State, on the relation of the prosecuting attorney. To this we answer, that, under the legislation of this State in relation to *quo warranto* informations, the State, by its attorney, occupies no higher nor better position than any interested citizen. An information by the State, on the relation of the prosecuting attorney, must state a case fairly within the purview and meaning of the statute, or the State, by its attorney, will take nothing by its suit.

In our opinion, the court below erred in overruling the appellants' demurrer to the appellee's information.

Having reached the conclusion, that the appellee's information was insufficient on the demurrer thereto, we need not now consider the other errors assigned, which call in question the sufficiency of the different paragraphs of the appellants' answer.

The judgment is reversed, and the cause is remanded, with instructions to sustain the appellants' demurrer to the appellee's information.

Opinion filed at November term, 1878, but cause carried to May term, 1879, by a petition for a rehearing then withdrawn.

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| 165 | 71 |

 EX PARTE WRIGHT.

CONTEMPT.—*Direct and Constructive Defined.*—A contempt of court is either direct or constructive: Direct, when there is an open insult, in the face

 Ex Parte Wright.

of the court, to the person of the judge while presiding, or a resistance of its powers in his presence ; constructive, when an act is done, not in the presence of, but at a distance from, the court, in disobedience of an order, or to the process, of the court, tending to embarrass, interrupt, obstruct or prevent the administration of justice.

SAME.—*Practice in Punishing Direct.*—*Record.*—An offender may be instantly punished for a direct contempt, by arrest and fine or imprisonment, without other proof or examination than the knowledge of the judge, gathered from his senses ; but, in rendering judgment and making up the record in such case, the causes of the contempt must be stated.

SAME.—*Practice in Punishing Constructive.*—In case of a constructive contempt, a *prima facie* case must be made against the alleged offender, either by an affidavit, by the official return of some officer, or by other legitimate evidence, in a way that can be made part of the record.

SAME.—*Rule Nisi.*—*Writ Attaching.*—In such case a rule *nisi* should be entered against the offender before the writ should issue, unless delay be dangerous to the injured party ; but in no case of constructive contempt can either the rule or the writ go, until the facts are put upon record in such manner that they may be demurred to, moved against or controverted.

SAME.—*Appeal to Supreme Court.*—An appeal lies to the Supreme Court from a judgment of the circuit court punishing a contempt.

SAME.—*Contempt by Defaulting Administrator.*—*Statute Construed.*—A contempt by an administrator, under section 161 of the decedents' estates act, 2 R. S. 1876, p. 549, consists of an embezzlement, or a concealment, of the goods of the estate, and a refusal to answer upon examination, or to deliver the same, or to secure the persons interested in the estate in the value of the same, with ten per cent. damages thereon.

SAME.—*Judgment.*—*Fine.*—*Imprisonment.*—Upon a showing by an administrator, and a finding by the court, of the amount with which he was chargeable, the court made an order that he pay the same over or stand in contempt ; whereupon he reported to the court that it was physically impossible for him, for want of means, to pay the same, but that he had arranged with the persons interested, and was ready, to convey certain real estate to them to secure the amount due. But the court summarily fined him in a certain sum, and ordered his imprisonment in the county jail for a specified time.

Held, that the fine was unauthorized, and that the imprisonment ordered was illegal, and should have been only until the administrator had complied with the order of the court, or until he was discharged according to law.

From the Marion Circuit Court.

A. C. Harris, for appellant.

BIDDLE, J.—On the 27th day of July, 1876, Charles A.

Ex Parte Wright.

Wright was appointed by the clerk administrator of the estate of William Northam, deceased; he accepted the trust, gave bond, was duly qualified, and received his letters of administration, all of which was subsequently confirmed by the court.

On the 14th day of December, 1878, "he filed his report, in partial settlement of" the said estate, showing that he was chargeable with the sum of two thousand three hundred and eighty-three dollars and seven cents, subject to the deduction of a credit of two hundred and ninety-five dollars and eighteen cents, leaving in his hands to be administered, the sum of two thousand and eighty-seven dollars and eighty-nine cents.

On the 29th day of April, 1879, without any further action in the matter, or any notice to the administrator, so far as any thing appears of record, the court made the following record:

"The court being informed in the above entitled estate, that Charles A. Wright, the administrator thereof, had [wasted] and was wasting said estate, now upon its own motion ordered an attachment against said administrator."

The attachment was issued, by virtue of which Wright was arrested, and his body brought before the court. On a hearing he was ordered to report the condition of the estate, by the 14th day of May, 1879, and was discharged until that date, upon his own recognizance. On the 17th day of May, 1879, Wright "filed a statement excusing himself from complying with the order of the court hereinbefore entered." Upon hearing, the court found that there was due to said estate, from said Wright, the sum of two thousand nine hundred dollars, which he had converted to his own use, failed to pay over, and refused to make farther report in the matters of said estate. Upon giving bond for his appearance before the court on the 29th day of May, 1879, the court "withheld judgment and sentence against Wright,

Ex Parte Wright.

for said contempt, until said 29th day of May, 1879." On the 30th day of May, 1879, Wright appeared before the court, and filed a supplemental report. Thereupon it was "considered and ordered by the court, that Charles A. Wright be fined in the sum of one dollar, and imprisoned in the county jail for three months, for his contempt of the order of this court, in not paying the balance due from him to said estate into court, as heretofore ordered ;" to all of which Wright excepted. Wright paid the fine in open court, and moved the court to modify the order so as to relieve him from imprisonment in the county jail. His motion was overruled, and he excepted, and appealed to this court.

It is insisted, on behalf of Wright, that the attachment has no sufficient foundation, and that there is no law in this State authorizing the fine and imprisonment adjudged against him.

Writs of attachment to punish contempts in the common-law courts were known in the earliest history of our jurisprudence. They were used in the Court of Chancery to bring in contumacious defendants, and compel an answer to the bill, or enforce a compliance with the orders of the court, upon which common-law writs of execution could not issue. By the statute of Westminster 2, 13 Edward I., c. 39, it was ordered, "that in case the process of the king's court be resisted by the power of any great man, the sheriff shall chastise the resisters by imprisonment, * * and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders and favourers, and by a special writ judicial they shall be attached by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure." The writ of attachment for contempts became a part of the law of England, and was confirmed by *Magna Charta*. 4 Bl. Com. 284, 286.

Ex Parte Wright.

A contempt of court is either direct or constructive ; or, as the latter was anciently called, consequential. A direct contempt is an open insult, in the face of the court, to the person of the judges while presiding, or a resistance to its powers in their presence. A constructive contempt is an act done, not in the presence of the court, but at a distance, which resists their authority, as disobedience to process, or an order of the court, such as tends in its operation to obstruct, interrupt, prevent or embarrass the administration of justice. For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no farther proof or examination than what is known to the judges by their senses of seeing, hearing, etc.; but, in rendering the judgment and making up the record, the causes of such contempt should be stated.

The grounds of a constructive contempt should be stated by affidavit, by the return of some officer, or in some way made known to the court, *prima facie*, by witnesses or otherwise, so that they may be made a part of the record; and this should be done before a rule or writ is granted against the alleged offender. 4 Bl. Com., 283, 286, 288; Tidd Practice, 478, 482.

Appeals did not lie, from judgments for contempt, from the courts of common law, nor from the court of chancery; nor, in the State of Indiana, from any court, except by statute in a few specific cases, until the adoption of the present code. Indeed, after that, it was still a disputed question, until the decision of *Whitem v. The State*, 36 Ind. 196, wherein the question is fully reviewed and put at rest, by holding that an appeal will lie from the circuit court to this court in all cases of contempt.

Statutes authorizing punishments for contempt, being against liberty and common right, must be construed strictly. BLACKSTONE well remarks: "It can not have escaped the attention of the reader, that this method of

Ex Parte Wright.

making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance; and seems indeed to have been derived to the courts of King's bench and common pleas through the medium of the courts of equity." 4 Bl. Com. 287, 288. And the American courts, throughout their decisions, frequently express similar opinions.

The only statute that we are aware of in this State, governing proceedings in contempt, in cases like the present, is the following :

"SEC. 161. In addition to removing him, if any executor or administrator shall embezzle or conceal any of the property of the decedent, the court shall attach his person and property, and examine him under oath touching such property, and on his refusing to answer in such examinations, or to deliver up such property, or secure the value thereof to the persons interested in such estate, with ten per centum damages thereon, shall commit him to jail until the order of the court is complied with, or he be discharged according to law." 2 R. S. 1876, p. 549.

Under this section a contempt consists of embezzlement or concealment of the goods, *and* a refusal to answer upon examination, *or* to deliver up such property, *or* to secure the persons interested in the estate, with ten per cent. There is no ground herein upon which to base a contempt for not paying over money found due from the executor or administrator. And, before an attachment should issue upon a constructive contempt, all the facts which constitute the contempt, must be made to appear *prima facie* to the court, by affidavit, or the official return of some officer, or by other legitimate evidence, in a way that they can be made a part of the record, and then, unless the case is flagrant, and will not admit of delay, a rule *nisi* should first be granted against the alleged offender, and an opportunity afforded him to defend himself from the charge ; but

Ex Parte Wright.

when the case is urgent, and delay dangerous to the interests of the injured party, upon case made, then the writ may go without first granting a rule *nisi*. In no case, however, of a constructive contempt, should either the rule or the writ go, until the facts are put upon record in some way that they can be demurred to, moved against, or controverted by evidence. The judge can not, in a constructive contempt, from facts remaining in his own mind, exercise the judicial discretion resting in his breast, and grant either a rule *nisi*, or the writ of attachment. Such hidden facts can not be put upon record, nor pleaded to, nor controverted in any method known to judicial proceedings.

The evidence in the present case is all before us. It consists of the orders of the court, and the report of the administrator sworn to, nothing more. It shows the appointment of Wright as administrator; that there is in his hands a balance amounting to the sum of two thousand and eighty-seven dollars and eighty-nine cents; that it is "physically impossible for him to pay it at present; that, after the order of attachment was made against him, an agreement was made between himself and the persons interested in the estate to convey certain lands of the value of two thousand four hundred dollars, to secure the debt to them; and that he is ready to convey the same at any time." There is no evidence tending to show embezzlement, except the fact that he can not pay over the money at the present time; none tending to show any concealment of the property; no refusal to return property, except that he has not got it to return, and his offer to secure the injured party. In all of this there is no contempt within the meaning of the statute.

It must be noticed, too, that, if the contempt was established, the statute does not authorize the infliction of a fine at all, nor the infliction of punitive imprisonment, but only, after the contempt is proved, imprisonment "until

 Ex Parte Wright.

the order of the court is complied with, or he be discharged according to law." The purpose of the statute is to enforce obedience to the orders of the court, not to punish the administrator. As the judgment now stands, if Wright were to comply with the order of the court at once, it would not discharge him from imprisonment. He would have to remain in prison the remainder of the three months, or appeal to this court, or seek executive clemency to be discharged. We know of no other way by which he could "be discharged according to law."

The following authorities, in addition to those already cited, fully discuss the question of contempts of court, and will show a remarkable harmony, except as to the right of appeal, in the statutes of the several States of the Union, and in the methods of procedure, and the remedy. *The State v. Tipton*, 1 Blackf. 166; *McMullen v. Furnass*, 1 Ind. 160; *Kelly v. Weddle*, 1 Ind. 550; *Hunter v. The State*, 6 Ind. 423; *Kernodle v. Cason*, 25 Ind. 362; *Ex Parte Smith*, 28 Ind. 47; *Whittem v. The State*, 36 Ind. 196; *The State v. Earl*, 41 Ind. 464; *Cutler v. The State*, 42 Ind. 244; *McConnell v. The State*, 46 Ind. 298; *Burke v. The State*, 47 Ind. 528; *Haskett v. The State*, 51 Ind. 176; *Wilson v. The State*, 57 Ind. 71; *Stumph v. Pfeiffer*, 58 Ind. 472; *Crook v. The People*, 16 Ill. 534; *Seaman v. Duryea*, 10 Barb. 523; *Pitt v. Davison*, 37 N. Y. 235; *Adams v. Haskell*, 6 Cal. 316; *Ex Parte Cohen*, 6 Cal. 318; *Ex parte Kearney*, 7 Wheat. 38; *Gray v. Cook*, 24 How. Pr. 432; *The Case of Brass Crosby, Lord Mayor of London*, 3 Wils. 188; *Holman v. The Mayor of the City of Austin*, 34 Texas, 668; *In the Case of Yates*, 4 Johns. 317; *In the Matter of Blair*, 4 Wis. 521; *Hosack v. Rogers*, 11 Paige, 608; *Johnston v. The Commonwealth*, 1 Bibb, 598; *Haines v. Haines*, 35 Mich. 138; *Bickley v. Commonwealth*, 2 J. J. Mar. 572; *Baltimore and Ohio R. R. Co. v. City of Wheeling*, 13 Grat. 40; *Commonwealth v. Newton*, 1 Grant, Pa.

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

453; *In re Hummel*, 9 Watts, 416; *Yates v. The People*, 6 Johns. 337; *Ex Parte Rowe*, 7 Cal. 175; *Vertner v. Martin*, 10 Sm. & M. 103; *M'Creadie v. Senior*, 4 Paige, 378; *Stuart v. The People*, 3 Scam. 395; *The People v. Hackley*, 24 N. Y. 74; *Regina v. Paty*, Ld. Raymond, 1105; *Ex Parte Langdon*, 25 Vt. 680; *The People v. Craft*, 7 Paige, 325; *The Albany City Bank v. Schermerhorn*, 9 Paige, 372; *Watson v. Nelson*, 69 N. Y. 536; Coke Lit. 288; 3 Redfield Wills, 412, secs. 27, 28, 29; *Rex v. Belt*, 2 Salk. 586; *Anonymous*, 2 Salk. 586.

We think, in this case, that there was no sufficient ground laid to authorize the attachment; that the facts proved do not constitute a contempt; that the fine assessed was without authority of law; and that the imprisonment exceeded the authority of the court, even though a contempt had been proved.

The judgment is reversed, and the cause remanded, with instructions to discharge the administrator from custody.

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NICHOLS, ADMINISTRATOR, ET AL. v. THE STATE, EX REL.
CLARK, TRUSTEE.

PRACTICE.—*Bill of Exceptions Filed too Late.*—*Record.*—A bill of exceptions, setting out certain motions and the rulings thereon, filed without leave of record, subsequent to the term at which such rulings were made, forms no part of the record.

SAME.—*Motion for New Trial not Cut Off by Special Finding.*—*Answers to Interrogatories.*—The making of a special finding of facts by the jury, in answer to interrogatories, does not cut off a motion for a new trial.

SAME.—*New Trial.*—*Assignment of Error.*—*Continuance.*—*Allowing Jury to take Evidence to their Room.*—Error in refusing a continuance, in refusing to submit an interrogatory to the jury, and in allowing the jury to take items of written evidence with them to their room, are grounds for a new trial, but can not be assigned in the Supreme Court, as errors.

SAME.—*Bill of Exceptions.*—*Motions to Strike Out, and to Paragaph.*—*Bill*

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

of Particulars.—Unless made part of the record by a bill of exceptions, no question is presented to the Supreme Court as to the action of the lower court in overruling motions for an order to paragraph the complaint, to strike out parts thereof, and for a bill of particulars thereto.

SAME.—*Demurrer for Misjoinder of Actions.*—*Harmless Ruling.*—An erroneous ruling upon a demurrer for a misjoinder of causes of action is not available to reverse a judgment.

TOWNSHIP TRUSTEE.—*Action on Bond.*—*Relator.*—*County Superintendent.*—Section 7 of the amendatory act of March 8th, 1878, Acts 1878, p. 79, and 1 R. S. 1876, p. 816, authorizes the proper county superintendent, in specified cases, to institute actions, on his own relation, on the bond of a defaulting township trustee, but does not confer that right upon him to the exclusion of such trustee's successor.

SAME.—The successor of a defaulting township trustee is a proper relator in an action on the bond of the latter.

SAME.—*Complaint.*—*Approval of Bond.*—*Demand.*—In an action on the bond of a deceased defaulting township trustee, the complaint set out the bond as an exhibit, which showed upon its face that it had been executed and acknowledged before, and approved by, the county auditor and had been duly recorded. The breaches alleged were a conversion of, and a failure to pay over, certain funds specifically alleged to have come into his hands, as such trustee.

Held, on demurrer, that no special demand was necessary, and that the bond had been executed, acknowledged, approved and recorded in accordance with the statute.

SAME.—*Duplicity.*—*Practice.*—Duplicity in a complaint may be reached by a motion.

SAME.—*Evidence.*—*Report.*—*Principal and Surety.*—A report made by a defaulting trustee to the county commissioners is admissible in evidence against, but is not conclusive upon, his estate or his sureties.

PRACTICE.—*Discretion of Court.*—*Evidence after Close.*—It is within the discretion of the court, after a party has closed his evidence, to allow him to introduce evidence as to a material fact, omitted before.

SAME.—*Interrogatory.*—It is within the discretion of the court trying a cause to decide whether an interrogatory propounded is relevant, properly framed and presented in time. And, if the ground covered by it has already been covered by another interrogatory, it may be refused.

SAME.—*Jury may not take with them Written Evidence.*—It is settled law in this State, that it is error to allow the jury, over the objections of a party, to take with them to their room, in consulting as to their verdict, items of documentary evidence introduced by the opposite party.

From the Monroe Circuit Court.

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

J. W. Buskirk, H. C. Duncan, J. R. East and C. W. Henderson, for appellants.

J. H. Loudon and R. W. Miers, for appellee.

PERKINS, J.—The State, on the relation of James B. Clark, trustee, etc., brought an action upon the bond of M. L. Snodgrass, as trustee of Bloomington township, Monroe county, Indiana, against Hiram J. Nichols, the administrator upon his estate, and John W. Harryman and Henry Rott, his sureties in said bond. The bond was executed by the obligors, and approved by the auditor of Monroe county, Nov. 5th, 1874.

James B. Clark, the relator, is the successor of said Snodgrass in the office of township trustee.

The amended complaint stated the public funds, and amount and kinds thereof, that had come to the hands of the said Snodgrass, trustee, and alleged a conversion of them, failure to pay, etc., as breaches of the bond.

Motions for a continuance, for a bill of particulars, and for an order to paragraph the complaint, were made and overruled, at the February term, 1876, but no time was given for the filing of a bill of exceptions, and the bill was not filed till the June term, 1876. This was too late. 2 R. S. 1876, p. 176.

A demurrer to the complaint was filed and overruled, assigning for causes:

1. Want of facts; and,
2. Misjoinder of causes of action.

Answer:

1. General denial;
2. Payment by Snodgrass;
3. Payment by the sureties, defendants;
4. That the bond sued on was given upon his entering the office upon a second term, to which said Snodgrass had been elected; that the defalcation occurred in his first term;

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

and that, consequently, the sureties in the first, not in the second, bond were liable.

Demurrers to the second, third and fourth paragraphs of answer, for want of facts, were overruled, and exceptions entered.

Reply in denial. Trial by jury at the April term of said court, verdict for plaintiff, for \$1,759.05, and answers to interrogatories, as follows :

"1. What amount of money, if any, did the deceased, Snodgrass, receive, as trustee, after October 19th, 1874, and before the execution of the bond in suit ?

"Ans. None.

"2. What amount of funds, if any, did Snodgrass have on hand, as trustee, when the bond in suit was executed ?

"Ans. \$2,551 $\frac{7}{100}$."

"3. What amount has said Snodgrass disbursed, as trustee, since the execution of the bond ?

"Ans. \$2,300 $\frac{7}{100}$."

Thereupon the defendants Rott and Harryman, sureties on the bond of Snodgrass, moved for a new trial, assigning eighteen causes therefor.

The special finding did not cut off a motion for a new trial.

The motion was overruled, and exceptions entered.

Appeal by Harryman and Rott, the sureties, Nichols, the administrator of Snodgrass, declining to join therein.

The errors assigned are as follows :

1. Overruling a motion for a continuance ;
2. Overruling motion for an order on plaintiff to paragraph complaint and furnish bill of particulars ;
3. Overruling motion to order parts of complaint to be struck out ;
4. Overruling demurrers to amended complaint ;
5. Permitting the jury to take with them, to their room, certain written evidence in said cause ;

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustees.

6. Refusing to submit interrogatory 4, propounded by appellants, to the jury; and,

7. Overruling the motion for a new trial.

The matters of the first, fifth and sixth assignments of error might have been assigned as causes for a new trial, but could not be assigned as errors on appeal. 2 R. S. 1876, p. 179.

The action of the court, complained of in the second and third assignments, is not shown by bill of exceptions to have occurred.

The fourth assignment of error was invalid. The amended complaint contained a cause of action.

The objections to it, urged by appellant, are three, viz.:

1. That the county school superintendent was the necessary relator, and sec. 7, Acts 1873, p. 78, is cited. See 1 R. S. 1876, p. 816.

2. That the complaint should have averred that the bond on which the suit was brought, had been approved by the county commissioners.

3. That it should have averred a special demand.

As to the first objection, it is enough to say, that, if the statute authorizes the county school superintendent to be a relator, it does not make him the exclusive relator in any case, but only gives him a right concurrent with that possessed by the township trustee, to act as such, in special cases. See *Inglis v. The State, ex rel.*, 61 Ind. 212.

As to the second objection, the bond was made an exhibit in the complaint, and filed with it. It showed that it was executed and acknowledged before, and approved by, the auditor of Monroe county, and was duly recorded. This was a compliance with the statute. Sec. 5, p. 900, 1 R. S. 1876. See *Allen v. The State, ex rel.*, 61 Ind. 268.

As to the third objection, that the complaint should have averred a special demand:—

This was not necessary, upon the facts alleged. *Shook*

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

v. *The State, ex rel.*, 53 Ind. 403; *Hudson v. The State, ex rel.*, 54 Ind. 378. The complaint was sufficient.

It may be here observed, that no judgment will be reversed "for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." 2 R. S. 1876, p. 59. •

Duplicity might be ground for a motion.

The seventh assignment of error, viz., the overruling of the motion for a new trial, remains to be considered.

Among the causes for a new trial were the following:

1. Error in giving certain specified instructions, severally excepted to;

2. Error in refusing certain instructions;

3. Error in permitting the plaintiff to prove a demand, after the State had rested;

4. Error in refusing to submit an interrogatory to the jury;

5. Error in permitting the jury to take with them, on retiring to consult of the verdict, certain items of written evidence;

6. Error in permitting the plaintiff to prove, upon the trial, the signature of Snodgrass, deceased, to the bond sued on, by the relator in the suit, James B. Clark, and permitting him to testify in the cause, over the objection of the defendant; and,

7. Error in admitting in evidence a report to the county commissioners, made by said trustee, Snodgrass, and one made by said relator, Clark, successor in office of said Snodgrass.

As to the first ground above mentioned for a new trial, viz., the giving of certain instructions:

The court instructed the jury thus:

"Evidence has been introduced, tending to show that in the month of October, 1874, and on the 20th day of

Nichols, Administrator, *et al. v. The State, ex rel. Clark, Trustee.*

that month, the said Snodgrass was trustee of said Bloomington township, and as such made his annual report to the board of commissioners, which report, showing the receipts and expenditures of said trustee, has been presented to you in evidence. This report you are to take as the amount with which said trustee was chargeable at that time, as well as the amount with which he should be credited at the 20th of October, 1874."

This cause was tried upon the theory that the reports of the officer were conclusive upon him and his sureties, and could not be attacked collaterally by either. We have held that this view of the law is erroneous as to the reports of guardians, and it must be equally so as to the reports of a township trustee. *Lowry v. The State, ex rel.*, 64 Ind. 421.

The like error was committed in the refusal of an instruction asked.

For this error the judgment in the case must be reversed. But, as a new trial will probably be one of the consequences of the reversal, it is proper that we intimate an opinion upon some of the other assigned errors.

The third cause, as above mentioned, for a new trial, states matter in the discretion of the court.

The cause numbered four arises, not under the following provision of the statute, 2 R. S. 1876, p. 156, sec. 303: "Either party may propound interrogatories to be filed with the pleadings relevant to the matter in controversy, and require the opposite party to answer the same under oath;" but under sec. 336, p. 171, of the volume above cited.

It is for the court below to decide whether an interrogatory propounded is relevant, properly framed, and presented in due time, and, where the party had already propounded one that was submitted to the jury, it might

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

not be error in the court to refuse to submit another covering precisely the same point.

As to cause five, appellees, in their brief, say :

“ We insist that the action of the court is sustained by law and reason. What could a jury do with a case involving several folios of charges and credits, without some memorandum to refresh their recollection? Does any one suppose that they could remember all these different amounts, and figure out an intelligent verdict? Not one. The objection was not made for the purpose of assisting the jury to arrive at a correct conclusion. Common sense demands that they should have the reports. What says the law? In the Revised Statutes of 1843, page 734, sec. 332, we have this provision : ‘ The court, in all trials, shall have a right to determine what papers shall be taken from the bar by the jury to their room, any former usage of law to the contrary notwithstanding.’

“ The revision of 1852 is silent as to what papers the court may permit the jury to take to their room. There is nothing in it on the subject. Section 802 of the Revision of 1852 (2 R. S. 1876, p. 314) provides, ‘ The laws and usages of this State relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force.’ The provision in the statutes of 1843 is not inconsistent with any provision in the code of 1852 on this subject, for the code of 1852 is silent. Hence section 332 of the Revised Statutes of 1843 is in force to supply an omitted case. It is entirely applicable to our present code, and supplies an omission. In *Waltz v. Robertson*, 7 Blackf. 499, the court permitted the jury to take to their room a bill of lumber, and this court sustained the ruling. In *Whithead v. Keyes*, 1 Am. L. Reg., n. s., 471, the Supreme Court of Massachusetts uses this language : ‘ It is not a matter of

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustees.

right that depositions used in the trial of a cause shall be delivered to the jury, on their retiring to consider of their verdict. It is matter of discretion, the exercise of which by a judge is not a legal ground of exception.' The following authorities are cited in support of the ruling: *Graham on New Trials*, 80; *Spence v. Spence*, 4 Watts, 165; *Alexander v. Jameson*, 5 Binney, 238.

"The Supreme Court of New York, in *Porter v. Mount*, 45 Barb. 422, in discussing this subject, say: 'Another exception was taken on the ground that the circuit judge allowed the jury, against the objection of the defendants' counsel, to take to their room the bond and mortgage received in evidence at the trial. In England there are some cases, and perhaps in this country, where new trials have been granted on such grounds, but it is time they were exploded and repudiated. * * If written documents or papers used in evidence on a trial can only be taken to a jury room upon the consent of the parties, it is quite apparent that the practice in such cases stands upon a very uncertain footing. Such consent will, many times, be withheld when the papers and documents would materially aid the jury in their deliberations. It is properly a question to be left unqualifiedly to the discretion of the circuit judge.' To the same effect is the case of *Schappner v. Second Av. Railroad Co.*, 55 Barb. 497."

See other cases in this court on this subject: *Alexander v. Dunn*, 5 Ind. 122; *Cheek v. The State*, 35 Ind. 492; *Bersch v. The State*, 13 Ind. 434; *Smith v. McMillen*, 19 Ind. 391; *Ball v. Carley*, 3 Ind. 577; *Matlock v. Todd*, 19 Ind. 130, p. 132; *Harrison v. Price*, 22 Ind. 165, on p. 168; *Collins v. Frost*, 54 Ind. 242; *Chance v. The Indianapolis, etc., G. R. Co.*, 32 Ind. 472; *Eden v. Lingenfelter*, 39 Ind. 19; *Lotz v. Briggs*, 50 Ind. 346.

In *Eden v. Lingenfelter*, *supra*, DOWNEY, J., says:

"Under the statute of 1843, the court could decide what

Nichols, Administrator, *et al.* v. The State, *ex rel.* Clark, Trustee.

papers the jury should take with them to their room. R. S. 1843, p. 734; *Waltz v. Robertson*, 7 Blackf. 499. But no such provision is found in the present statute. The practice almost uniformly prevailing over the State, and the better practice, too, we think, is not to send the evidence out with the jury, except as they carry it in their memory. This may be inferred, probably, from the section of the code of practice which we have quoted, which provides that the jury shall be brought into court if they disagree as to any part of the testimony, etc."

In *Lotz v. Briggs*, *supra*, it is said, by WORDEN, J. :

"On the trial of the cause, the defendant gave in evidence the record of a former action between the same parties in the same court. As the jury were about to retire to consider of their verdict, they requested to be permitted to take the papers constituting the record thus given in evidence to their room, to determine the issue involved in that case. To this the plaintiff objected, but the court overruled the objection, and allowed the jury to take the papers to their room. Plaintiff excepted. This is assigned as one of the causes for a new trial.

"This action of the court was erroneous, as was held by this court, in the case of *Eden v. Lingenfelter*, 39 Ind. 19. See, also, *Cheek v. The State*, 35 Ind. 492."

We regard it as settled law in this State, that it is error to permit, over the objections and exceptions of the opposite party, items of documentary evidence to be taken to their consultation room by the jury. We approve of this view of the law, as likely to be attended, in its practical administration, with less evil than would attend the opposite rule of law on this subject.

As to the sixth cause for a new trial, viz., permitting Clark to testify, see *Cravens v. Kitts*, 64 Ind. 581. See the act of March 15th, 1879, Acts 1879, p. 245, which will be in force before this cause can be again tried. The

Perry v. Barnett.

execution of the bond was not proved by said Clark, but by one Mr. Hunter.

Touching the seventh cause for a new trial, we think the first report mentioned therein was admissible in evidence. The sureties in the bond sued upon would be liable for moneys that were in the trustee's hands when said bond was executed, or that came into his hands afterward, in his official capacity. *Allen v. The State, supra*. We think the trustee's report as to the amount of funds in his hands on the 20th of October, 1874, would be admissible as tending to show the amount in his hands on the 5th of November following. It would not, of course, be conclusive.

As to the second report objected to, we do not discover that it could have harmed the defendants; but the facts touching its admission are not stated with such precision in the record as to enable us to judge of the correctness of the ruling below in admitting it.

Reversed, with costs; cause remanded for further proceedings in accordance with this opinion.

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PERRY v. BARNETT.

NEGLIGENCE.—Wilful Carelessness.—Obstruction of Highway.—Bridge.—Complaint for Damages.—A complaint for damages alleged that the plaintiff, in travelling along a public highway, without fault or negligence on his part, drove his team upon a "pile of wooden timbers, intended to serve as a bridge, which the defendant had placed in said road at a point where" it crossed a "deep and dangerous bayou;" that such timbers "had been so carelessly placed there by the defendant, that" plaintiff's team "fell through and over said timbers," and were killed; that such accident "was wholly and solely attributable to the negligence, carelessness and wilful misconduct of the defendant in placing" such timbers at a point in "said road where

Perry v. Barnett.

they could not be avoided by travellers, nor the danger * ascertained before going upon them."

Held, on demurrer, that the complaint is sufficient.

SAME.—Evidence.—Supervisor.—Evidence showing that the defendant, as the proper supervisor, had built such bridge in an unskillful manner, and of unfit material, would not sustain a verdict for the plaintiff under such complaint.

From the Jackson Circuit Court.

B. H. Burrell and *F. Emerson*, for appellant.

S. B. Voyles, for appellee.

WORDEN, J.—Action by Barnett against Perry.

The complaint alleged, " That heretofore, in 1874, the plaintiff was the exclusive owner of two living mules, each of which was worth the sum of \$150; that plaintiff was going along one of the public highways in Vernon township, in Jackson county, Indiana, driving said mules, which were hitched to a wagon, when, without fault or negligence of this plaintiff, he drove said mules and wagon upon a structure or pile of wooden timbers, intended to serve as a bridge, which the defendant had placed in said road, at a point where said road crosses a deep and dangerous bayou, and said structure or pile of wooden timbers were and had been so carelessly placed there by the defendant that said plaintiff's mules fell through and over the said timbers, and such fall resulted in the death of said mules then and there, to the damage of this plaintiff of \$300; that defendant, in placing said timbers in said road, acted carelessly and without regard to the safety of travellers of said road, such as the plaintiff at the time was, and the destruction of the plaintiff's property was wholly and solely attributable to the negligence, carelessness and wilful misconduct of said defendant in placing said dangerous timbers in said road, at said point of said road, where they could not be avoided by travellers, nor the dangerous condition ascertained before going upon them; and the plaintiff avers, that, by reason of the de-

Perry v. Barnett.

fendant's wilful negligence, as aforesaid, this plaintiff was and is damaged by the said loss of his said mules in the sum of \$300, for which sum, together with costs, he prays judgment against the defendant."

The defendant demurred to the complaint, for want of sufficient facts, but the demurrer was overruled, and he excepted.

Issue; trial by jury; verdict and judgment for the plaintiff, over a motion for a new trial.

Errors are assigned upon the rulings upon the demurrer and the motion for a new trial.

The complaint seems to us to have been good. It alleged an obstruction by the defendant of the highway, whereby the plaintiff, without any fault on his part, was injured. *Wood v. Mears*, 12 Ind. 515.

On the trial of the cause, it appeared that the defendant was the supervisor of the road district in which the alleged "pile of wooden timbers, intended to serve as a bridge," was placed upon the road. The "pile" consisted of a bridge built across the bayou. It was built under the direction of the defendant, as such supervisor. The bridge was not, of itself, an obstruction of the highway. It was a good, substantial bridge, except the defects hereinafter stated. It was about eighteen feet long, twelve feet wide, and eight feet high above the water. It had no side railing, and the approaches were "too steep," in the language of one of the witnesses. It was covered with two-inch green plank, laid close together, but not spiked or otherwise fastened down; but stakes were put in at the front of the approaches, to keep the floor from slipping. The bridge was built in September, 1874. In January, 1875, the plaintiff was driving along the road with his mules, and attempted to cross the bridge. At this time, it may be supposed, the planks covering the bridge had become, to some extent, seasoned and shrunk. When the

Perry v. Barnett.

mules got upon the bridge, the wagon yet being upon the steep approach, they began to slip, and caught their toes in the cracks between the planks covering the bridge and turned them over, the legs of the mules going through the bridge. One of the mules, in his struggles to free himself, was precipitated over the edge of the bridge upon the ice below, and was killed. The other was so badly injured that he died a few months afterward. No fault, so far as we can see, was attributable to the plaintiff.

This was the case, in substance, made by the plaintiff's evidence; and the question arises, whether it made out the case stated in the complaint. The complaint alleges, that "the destruction of the plaintiff's property was wholly and solely attributable to the negligence, carelessness and wilful misconduct of the defendant, in placing said dangerous timbers in said road, at said point of said road where they could not be avoided by travellers, nor the dangerous condition ascertained before going upon them."

The theory of the complaint is, that the defendant carelessly and wilfully placed an obstruction in the highway. The evidence does not show such obstruction.

The defendant, as such supervisor, had authority to build the bridge, which, as a bridge, was no obstruction. If the defendant was guilty of any wrong, it was in this, that he failed, as such supervisor, to put or keep the bridge in a proper condition to make it reasonably safe; and if he is liable to an action at all in the premises, it is for failing to discharge his official duty in that respect.

We need not, in this case, determine whether he would be liable to such action or not. That would depend upon the powers conferred, and the duties imposed upon him, and the means at his command to perform the duties imposed. *House v. The Board of Comm'rs of Montgomery Co.*, 60 Ind. 580.

The Grand Rapids and Indiana R. R. Co. v. Boyd.

We are of opinion that the evidence did not support the case stated in the complaint; in other words, that the complaint was not proved "in its general scope and meaning." 2 R. S. 1876, p. 81, sec. 96. *The Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

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THE GRAND RAPIDS AND INDIANA R. R. CO. v. BOYD.

RAILROAD.—*Common Carrier of Passengers.*—*Negligence.*—A passenger upon a railroad train takes all the risks attending that mode of travel, except such as are caused or increased solely by the negligence of the carrier.

SAME.—A common carrier is an insurer of the passenger's safety only against the risks caused or increased solely by its own negligence.

SAME.—*Extent of Negligence.*—The negligence for which the carrier is liable includes negligence concerning the condition of its road, the character of its machinery, the quality of its cars, the sufficiency of its equipments, the skill and conduct of its agents and employees, and every other thing necessary to the safety of a passenger who himself is not at fault.

SAME.—*Action by Passenger for Injury.*—*Special Finding.*—*Answers to Interrogatories.*—*Verdict.*—In an action against a railroad company, by a passenger, for injuries received through the alleged negligence of the defendant in employing an incompetent engineer and defective machinery, in suffering the road to be out of repair and in running the train recklessly, thereby wrecking the train carrying the plaintiff, the jury, with their general verdict for the plaintiff, found specially, that, at a point on the defendant's road where the ties were bad and the rails short, because of a flaw, discoverable by a practicable test, in an axle of one of the trucks of the tender, such axle broke, throwing the train on which the plaintiff was riding from the track, thereby injuring him.

Held, that such finding supports, but is no stronger than, the general verdict.

SAME.—*Judgment Non Obstante.*—Such jury also found specially, that, three

The Grand Rapids and Indiana R. R. Co. v. Boyd.

months previous to the accident, such axle had been "tested * by the best approved methods in use" and had been duly inspected just before the train left on the trip during which the accident occurred; that the flaw could not have been detected; that the axle had been made by a good and reputable manufacturer; that the train, at the time of the accident, was running at a safe rate of speed; that the road was in ordinary condition; and that no act of negligence "in particular" had been committed by the defendant, or by any of its agents or employees "in particular."

Held, that the defendant was entitled to judgment notwithstanding the verdict.

From the Elkhart Circuit Court.

A. A. Chapin, for appellant.

J. D. Ferrall and *J. S. Drake*, for appellee.

BIDDLE, J.—Complaint in two paragraphs, by the appellee, against the appellant, for an alleged injury received as a passenger, through the negligence of the appellant as a common carrier. Both paragraphs are essentially the same, but, as the second is more full and complete in its averments than the first, we omit the first entirely.

The second paragraph avers, in substance, that the appellant, at and before the time of the alleged injury, was the owner of a railroad for the conveyance of passengers for hire, extending from Fort Wayne, in Allen county, Indiana, to Petoskey, in Emmet county, in the State of Michigan, and in its course passing through Lagrange, in Lagrange county, Indiana, and Grand Rapids, in the State of Michigan; that, on the 4th day of November, 1874, the appellee, Boyd, took passage on a train of cars on said railroad, at Lagrange aforesaid, for Grand Rapids; that the appellant, disregarding her duty in that behalf, employed a careless and incompetent engineer to run said train, and she suffered and permitted the said railroad to get out of repair, in this, that the cross-ties were rotten, and the rails thereon were insecurely fastened down and out of shape, and that the cars were not kept in a good and safe condition for the conveyance of passengers, that one

The Grand Rapids and Indiana R. R. Co. v. Boyd.

of the axles under the tender was carelessly suffered and permitted to remain for a long time in a defective and unsafe condition, and that, while said engineer was running said train of cars at a high and dangerous rate of speed, the car in which the appellee was riding was thrown from the track, by reason of the breaking of the axle undersaid tender, and the unsound ties and insecure fastening of the rails, and precipitated down an embankment, and that, after the breaking of said axle, and the said cars were off the track, the appellant continued to run said train of cars at an unreasonable and dangerous rate of speed, without making proper efforts to stop them; that, by reason thereof and without any negligence or carelessness on the part of the appellee, but wholly on account of the negligence and carelessness of the appellant and her employees, he was greatly and permanently injured and bruised in his back, spine and lower limbs, and in consequence thereof he was sick for a long time, and suffered great pain, and was unable to perform any labor or make any violent exertion, and that he has expended large sums of money for medical attendance and in endeavoring to be cured of his injuries so received, whereby he has been greatly damaged, for which he demands judgment.

A separate demurrer, for the alleged want of sufficient facts, was overruled to each paragraph of the complaint, and exceptions reserved. The answer was a general denial. Trial by jury, and a general verdict for the appellee.

With the verdict the jury returned answers to the interrogatories submitted by the appellee, as follows:

"1st. Was the plaintiff injured by a train of cars being thrown from the track of the defendant's railroad, on or about the 5th of November, 1874?

"Ans. Yes.

"2d. Was plaintiff, at the time, a passenger on defendant's cars?

"Ans. Yes.

"3d. Did an axle in the trucks to the tender in said train break, and contribute to the injury of plaintiff?"

"Ans. Yes.

"4th. Was there a flaw or defect in said axle, before the accident?"

"Ans. Yes.

"5th. Could said flaw or defect have been discovered by any practicable test?"

"Ans. Yes.

"6th. Is there such an appliance known as a safety beam, iron or stirrup, and used on the trucks of cars and tenders?"

"Ans. Yes.

"7th. For how long was said appliance known to defendant, prior to the 5th of November, 1874?"

"Ans. About 4 years.

"8th. Is the use of the safety beam or iron designed to, and will it tend to, prevent accidents to broken axles, broken in the manner of the one in question in this case?"

"Ans. It might be possible.

"9th. Was the train running at a high and dangerous rate of speed at the time of the accident?"

"Ans. No.

"10th. At what rate of speed was the train running at the time of the accident?"

"Ans. About thirty miles per hour.

"11th. Were the defendants or her agents negligent in the management of said train?"

"Ans. No.

"12th. What agent was negligent or careless in the management of said train?"

"Ans. None.

"13th. Was said railroad track, at the place of accident, in good order and repair?"

"Ans. Ordinarily.

The Grand Rapids and Indiana R. R. Co. v. Boyd.

"14th. If said track was not in good repair, state in what way and manner it was not in good order and repair.

"Ans. Bad ties and short rails."

The jury also returned answers to interrogatories submitted by the appellant, as follows :

"1st. Where did the accident occur, by which plaintiff claims to have been injured ?

"Ans. Near county line, between Kent and Allegan counties, in Michigan.

"2d. Was not the accident caused by the breaking of an axle of the tender of the engine of the train upon which the plaintiff was riding ?

"Ans. Yes, it was.

"3d. Was there any defect in said axles ?

"Ans. Yes, there was.

"4th. If there were any defect in the axle, state what it was.

"Ans. It was a flaw.

"5th. Was not said axle, in the month of August prior to the accident, tested under the supervision of James M. Boon, by the best approved methods in use ?

"Ans. Yes, it was.

"6th. If said axle was tested, and in the manner named in the preceding question, was any defect discovered ?

"Ans. None.

"7th. Was not the said engine and tender inspected at Fort Wayne, before the train left on the trip in which the accident occurred ?

"Ans. Yes.

"8th. If there were any flaw in said axle, could it have been detected by a careful inspection before the train left Fort Wayne on that trip ?

"Ans. It might not at that time.

The Grand Rapids and Indiana R. R. Co. v. Boyd.

"9th. Was not said axle made by a good and reputable manufacturer?

"Ans. Yes, it was.

"10th. Did said axle receive any unusual strain before it broke, and, if so, when and where did it receive it?

"Ans. No unusual strain proven.

"11th. At what rate of speed per hour was the train running at the time of the accident?

"Ans. Thirty miles.

"12th. Was the engineer running the train at an unusual rate of speed, at the time of the accident?

"Ans. No.

"13th. Was not thirty miles an hour a safe rate of speed on the road at the place where the accident occurred, as shown by the evidence?

"Ans. Yes, it was.

"14th. Was not said road in good condition, at the place where the axle broke?

"Ans. Ordinary condition.

"15th. What agent or employee of the defendant committed any act of negligence or unskilfulness, or omitted to perform any duty, that caused the alleged injury?

"Ans. No one in particular.

"16th. What act or acts of negligence, if any, on the part of said defendant or its agents, contributed to the injury complained of by plaintiff?

"Ans. None in particular.

"17th. At what time and place did any act of negligence or misconduct of defendant or her agents occur, that caused the alleged injury to take place?

"Ans. Previous to and near the place of accident.

"18th. If you find that said railroad track was in bad condition or repair, at place of accident, state fully wherein it was in bad condition or repair.

"Ans. Bad ties and short rails.

The Grand Rapids and Indiana R. R. Co. v. Boyd.

" 19th. Would a safety stirrup have prevented this accident?

" Ans. It would not.

" 20th. If there was any flaw in the axle, did it come to the surface?

" Ans. It did not come to the surface.

" 21st. Does the evidence show that the hydrostatic press had ever been used, prior to this accident, to test axles before being used?

" Ans. No.

" 22d. Does not the evidence adduced in this show that the hydrostatic press was not known as a practical test for axles prior to the accident?

" Ans. It does.

" 23d. If the hydrostatic press had been used as a test prior to this accident, by whom had it been used?

" Ans. Don't know of its being in use."

A motion for a new trial was made and overruled, and exceptions reserved. Motion by appellant, to require the jury to answer certain special interrogatories more specifically, overruled, and exceptions; motion for judgment on the special finding in favor of appellant, notwithstanding the general verdict, overruled; exceptions; judgment on the general verdict; appeal.

The errors assigned in this court are:

1. Overruling the demurrer to the complaint;
2. Overruling the motion for a new trial; and,
3. Overruling the motion for judgment on the special findings.

The complaint seems to us to be well drawn, and to contain all the necessary averments. It is so clearly sufficient that we do not further examine the question. Indeed, this question is essentially waived in the brief of the counsel.

Did the court err in refusing to render judgment in favor of the appellant, on the special finding of facts, notwith-

The Grand Rapids and Indiana R. R. Co. v. Boyd.

standing the general verdict? This, we believe, is the controlling question in the case.

When the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. This is settled law and needs no discussion. 2 R. S. 1876, p. 172, sec. 337; *Fromm v. Leonard*, 21 Ind. 243; *Amidon v. Gaff*, 24 Ind. 128; *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *Snyder v. Robinson*, 35 Ind. 311; *Campbell v. Dutch*, 36 Ind. 504; *Wisler v. Holderman*, 40 Ind. 106; *Stockton v. Stockton*, 40 Ind. 225; *Ridgeway v. Dearing*, 42 Ind. 157; *Skillen v. Jones*, 44 Ind. 136; *Shanks v. Albert*, 47 Ind. 461; *Adams v. Cosby*, 48 Ind. 153; *Nebeker v. Cutsinger*, 48 Ind. 436; *The Indianapolis & St. Louis R. R. Co. v. Stout*, 53 Ind. 143; *Alexander v. The North-Western Christian University*, 57 Ind. 466.

A railroad company, that is a common carrier of passengers, is not liable to the passenger it carries, except for negligence in the carrying, whereby the passenger, without his own fault, is injured. The passenger takes all the risks of travel, according to the mode by which he travels, except such as are caused or increased by the negligence of the carrier, without the fault of the passenger. A common carrier of passengers is not an insurer of the passenger's safety against all the accidents and vicissitudes of travel, but is an insurer against all risks caused or increased by the negligence of the carrier, where the passenger is not at fault. The negligence of a common carrier in carrying the passenger includes his negligence in all the departments of his undertaking; the condition of the road, the character of the machinery, the quality of the cars, the sufficiency of the equipments, the skill and conduct of the agents and employees; in every thing, indeed, necessary to the safety of the passenger, when he is not himself at fault.

The following authorities will support these proposi-

The Grand Rapids and Indiana R. R. Co. v. Boyd.

tions: *The Indianapolis, Bloomington and Western R. W. Co. v. Beaver*, 41 Ind. 498; *The St. Louis and South-Eastern R. W. Co. v. Valirius*, 56 Ind. 511; *The Ohio and Mississippi R. W. Co. v. Dickerson*, 59 Ind. 317; *Hegeman v. The Western R. R. Corporation*, 13 N. Y. 1; *Frink v. Coe*, 4 Greene, Iowa, 555; *McElroy v. The Nashua and Lowell R. R. Corporation*, 4 Cush. 400; *The Philadelphia and Reading R. R. Co. v. Derby*, 14 How. 468; *Taylor v. The Grand Trunk R. W. Co.*, 48 N. H. 304; *New Jersey R. R. Co. v. Kennard*, 21 Pa. State, 203; *Meier v. The Pennsylvania R. R. Co.*, 64 Pa. State, 225; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; *Galena and Chicago R. R. Co. v. Yarwood*, 15 Ill. 468; *Frink v. Potter*, 17 Ill. 406.

It remains to apply the law, as above expressed, to the averments in the complaint, the general verdict, and the special finding of facts in the case before us upon the question presented.

Upon the special questions numbered 1, 2, 3, 4, 5 and 14, submitted to the jury by the appellee, and questions 2, 3, 4, 17 and 18, submitted to the jury by the appellant, with their answers, the following special facts are found by the jury: That the appellee was a passenger on the appellant's railroad; that he was injured by the train of cars being thrown from the track; that an axle in the trucks of the tender in said train broke; that the breaking of the axle contributed to the injury of the plaintiff; that there was a flaw or defect in the axle, before the accident occurred; that the flaw or defect could have been discovered by a practicable test; that the track of the road was not in good repair, on account of bad ties and short rails; that the accident was caused by the breaking of the axle having the defect; and that the acts of negligence, which caused the alleged injury, took place previous to and near the place of the accident.

The Grand Rapids and Indiana R. R. Co. v. Boyd.

These facts are favorable to the appellee, but they are no stronger in his favor than the general verdict, nor is the general verdict any stronger in his favor on account of the facts so specially found. They all fall within the general verdict.

Upon the special questions numbered 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16, submitted to the jury by the appellant, and questions 11 and 12, submitted to the jury by the appellee, with their answers, the following facts are found by the jury: That the axle, in the month of August prior to the accident, which occurred in November, was tested by the best approved methods in use, and no defect in it discovered; that the engine and tender were inspected at Fort Wayne, before the train left on the trip in which the accident occurred; that any flaw in the axle might not have been detected by such inspection at that time; that the axle was made by a good and reputable manufacturer; that it received no unusual strain before it broke; that the train was not running at an unusual rate of speed, but at a safe rate, at the time the accident occurred; that the road was in ordinary, good condition, that no agent or employee of the appellants, "in particular," committed any act of negligence or unskillfulness, or omitted to perform any duty that caused the alleged injury; that no act of negligence, "in particular," on the part of the appellant or its agents, contributed to the injury complained of; that neither the appellant nor its agents were negligent or careless in the management of the train.

All the facts stated in the special finding must be taken and construed together, to ascertain their true legal effect, and when so taken and construed together, if they are inconsistent with the general verdict, they must be held to control it; yet, if they can be reconciled, by any fair hypothesis or construction, with the general verdict, it

Sutton v. Parker et al.

ought to stand. It seems to us impossible, in this case, to reconcile the facts stated in the special finding, with the general verdict. By the general verdict the appellee is entitled to recover; and by the facts stated in the special finding the appellant is entitled to recover. They can not be reconciled. The facts stated in the special finding negative all negligence on the part of the appellant, and, if without negligence, the appellant can not be held liable, although the appellee has been injured by the accident. In this condition of the case we are of opinion that the appellant is entitled to judgment in its favor, on the facts stated in the special finding, notwithstanding the general verdict.

The judgment is reversed, at the costs of the appellee, and the cause is remanded, with instructions to the court below to render judgment in favor of the appellant, on the facts stated in the special finding, notwithstanding the general verdict.

SUTTON v. PARKER ET AL.

FEES AND SALARIES.—*Act of 1875.—Clerk's Fees.—Enrolled Act.—Mistake.*—

The 6th item of the specifications of section 5 of the fee and salary act of March 12th, 1875, reading "For all entries in order books on complete record," etc., as published in the Acts of 1875 Spec. Sess., p. 33, and in 1 R. S. 1876, p. 468, should read "For all entries in order books or complete record," etc., as shown by the enrolled act on file in the office of the Secretary of State.

SAME.—*Fees for Copies, Transcripts, etc.*—Items 4 and 5 of such section relate to the same subject-matter, viz.: Copies, transcripts or exemplifications of any record or paper remaining in the clerk's office.

SAME.—*Fee for Copy.*—Where any such copy contains less than five hundred words, the clerk is authorized, by item 5, to charge fifty cents; but, if the number of words exceeds five hundred, then, by item 4, he is authorized to charge a fee of ten cents for each hundred words.

SAME.—*Entries on Order Book or Complete Record.*—Items 6 and 7 of such section relate to the same subject-matter, viz.: Entries in the order book or complete record.

Sutton v. Parker et al.

SAME.—*Fee for Entry on Order Book and Fee Book.*—*Special Finding.*—On a motion to re-tax the clerk's fees in a cause which had been tried in the circuit court, that court found specially that there had been five separate entries made by the clerk in the order book, in said cause, containing an aggregate of less than five hundred words; and that an entry had been made upon the fee book by the clerk, in such cause, containing less than five hundred words.

Held, as a conclusion of law, that, under item 7 of said section 5, the clerk was entitled to tax a fee of fifty cents for each of such entries in the order book.

Held, also, that, for such entry in the fee book, he was entitled to tax a fee of ten cents for each hundred words contained therein.

From the Shelby Circuit Court.

L. J. Hackney, C. Baker, T. A. Hendricks, O. B. Hord and A. W. Hendricks, for appellant.

T. B. Adams, L. T. Michener, J. B. McFadden and J. W. Tomlinson, for appellees.

Howk, C. J.—In and during the year 1877, the appellant, Bellamy S. Sutton, was the clerk of the Shelby Circuit Court.

On the 23d day of February, 1877, the appellee Squire G. Parker, as plaintiff, commenced an action against his co-appellee, George W. Kennedy, as defendant, in said court, in vacation. At the March term, 1877, of said court, the parties to said action appeared, and, after divers proceedings were had therein, the cause was disposed of, and it was determined by the court that the parties, plaintiff and defendant, should each pay the one-half of the costs accrued in said action. The appellant, as clerk, then taxed the costs accrued in said cause; and this is a proceeding by the parties in said action, by motion in writing, addressed to the court below, to compel the appellant, as such clerk, to re-tax said costs.

The appellant appeared and answered the appellees' written motion, by a general denial of the material allegations therein. The cause was submitted to the court for hearing and decision; and, at the request of the appellant,

Sutton v. Parker et al.

the court made a special finding, in writing, of the facts and its conclusions of the law upon them. The appellant duly excepted to the court's conclusions of law upon the facts specially found; and judgment was rendered by the court upon and in accordance with its special finding, from which judgment this appeal is now prosecuted.

In this court the appellant has assigned, as error, that the court below erred in its conclusions of law upon the facts specially found. The special finding of the court was as follows:

“ At the request of said Sutton, the court finds specially, that an action was disposed of in this court, at the present term, in which Squire G. Parker was plaintiff, and George W. Kennedy was defendant; that, of the proceedings in said cause, there were five several entries upon the order book of said court, the first of which consisted of forty words, being the record entry of the motion of the defendant to strike out part of the plaintiff's complaint, for which said clerk charged a fee of fifty cents; that the second of said entries consisted of one hundred words, being the second [record?] entry of the ruling of the court upon said motion to strike out, for which said clerk charged a fee of fifty cents; that the third of said entries consisted of thirty words, being the record entry of the filings of the defendant's demurrer to the plaintiff's complaint, and his answer in said cause, for which said clerk charged a fee of fifty cents; that the fourth of said entries consisted of thirty words, being the entry of the filing of the plaintiff's reply in said cause, for which said clerk charged a fee of fifty cents; that the fifth of said entries consisted of seventy words, being the entry of recording the agreement of dismissal and judgment, for which said clerk charged a fee of fifty cents; and the sixth of which entries consisted of two hundred words, being an entry of the costs in said cause upon the fee book of said court, for which said clerk charged a fee of fifty cents; and

making in the aggregate four hundred and seventy words, and the aggregate of which charges amounted to three dollars; said several items being the only disputed or questioned items of the charges. And the court concludes, upon said facts, that said taxation, as to said several items is erroneous and contrary to law; that said clerk is entitled to only fifty cents for said five order-book entries, consisting in the aggregate of two hundred words, and that he is entitled, for said entry of two hundred words, upon the fee book, [to?] ten cents for each one hundred words or twenty cents for said two hundred words, and seventy cents for said four hundred and seventy words in said six several entries."

The question presented for our decision, upon the record of this cause and the error assigned thereon, involves and depends upon the proper construction of the 5th section of the fee and salary act approved March 12th, 1875. 1 R. S. 1876, p. 468. Therefore we set out this 5th section of said act, in this connection, as follows:

"SEC. 5. That the clerks of the circuit, superior and criminal courts of this State shall tax and charge upon the proper books to be provided and kept in their offices for the services by them performed in said county, the fees and amounts following, to wit:

1. "For each writ, summons, or other process, under seal, except fee bills, executions and subpœnas50
2. "For each subpœna, to include all witnesses of one county called for at one time.25
3. "For issuing and filing each subpœna for the grand jury.10
4. "For each one hundred words of copy of any record or paper when required, four figures counting as one word .10
5. "And if the number of words in any copy be less than five hundred words, for such copy50
6. "For all entries in order books on complete record,

Sutton v. Parker et al.

when no specific fee is allowed, per one hundred words, four figures counting as one word10

7. "And if the number of words in any copy be less than five hundred words, for such copy50

8. "For receiving and entering a verdict of a jury .10."

The above extract, from said 5th section, contains all of the section, or of the fee and salary act, which has a direct bearing upon the questions for decision in this case. For the sake of convenient reference, we have numbered, as above, the different items of said section, from 1 to 8, both inclusive. We may premise, that an examination of the enrolled act, in the office of the Secretary of State, has disclosed the fact that there is a mistake in the item numbered 6 as above, as the same appears in print in the Acts of the Special Session, 1875, pp. 32, 33, and in 1 R. S. 1876, p. 468, in this: That the word *on*, as it appears in print in said item, is a misprint of the word *or*, which is the word used and found in said item, as it appears in the enrolled act. So that the true and correct reading of said item numbered 6, as above, as shown by the enrolled act, is as follows:

6. "For all entries in order books or complete record, when no specific fee is allowed, per one hundred words, four figures counting as one word..... .50"

There is another section of another statute, which has an important, and it seems to us, a controlling bearing upon the question for decision in this case; and that is section 22 of "An act providing for an organization of circuit courts," etc., approved June 1st, 1852, which section reads as follows:

"Sec. 22. It shall be the duty of the clerk of the circuit court to draw up each day's proceedings at full length, and the same shall be publicly read in open court, after which they shall be signed by the judge; and no process shall issue on any judgment or decree of the

court until it shall have been so read and signed." 2 R. S. 1876, p. 10.

Again, in section 3 of "An act providing for the election of clerks of the circuit court, and prescribing some of their duties," approved June 7th, 1852, it is made the duty of such clerks, *inter alia*, to "enter, in the proper record books, all orders, judgments, and decrees of such courts, and in final record books, within one month after the same are finally determined, a complete record of all causes" in which a complete record may be required by law, or may be requested by either party. 2 R. S. 1876, p. 16.

In the case at bar, it will be observed, that, in its special finding, the court below has found, that, in the proceedings in the cause wherein the appellees had moved the court for an order requiring the appellant, as clerk, to re-tax the costs, "there were five several entries upon the order book of said court," each of which several entries contained less than five hundred words; and that there was a sixth entry on the fee book of said court, which also contained less than five hundred words. In his taxation of the costs of said cause, the appellant, as clerk, had taxed a fee of fifty cents for each one of said several entries on the order book, and a like fee of fifty cents for said entry on the fee book, making the aggregate costs taxed for all of said entries the sum of three dollars.

The total number of words, in all of the said five entries on the order book, the court has found to be four hundred and seventy words; and, upon this finding of fact, the court has found, as a conclusion of law, that the appellant, as clerk, was entitled, under the law, to a fee of only fifty cents for all of the said five several entries on the order book, in the aggregate. The court has also found that the total number of words in the entry on the fee book was two hundred words; and, upon this finding of

Sutton v. Parker et al.

fact, the court has found, as a conclusion of law, that the appellant, as clerk, was entitled, under the law, to a fee or costs at the rate of ten cents for each one hundred words, or twenty cents in the aggregate, for said entry in said fee book. It will be seen, that, under the finding of the court and its conclusion of law, the aggregate costs of the appellant, as clerk, for the said six entries, were only seventy cents, instead of three dollars, as taxed by the appellant.

The question for our decision in this case is this: Under the facts found by the court in its special finding, what were the costs to which the appellant, as clerk, was justly entitled, under a fair and reasonable construction of that part of section 5, above quoted, of the fee and salary act of March 12th, 1875? It may be assumed, as the contrary was not found by the court, that the five several entries in the cause, in the order book, were properly and legally made by the appellant, as clerk, under that provision of the statute, above quoted, which made it his duty "to draw up each day's proceedings at full length." Each of said five several entries, in the order book, contained less than five hundred words. Was the appellant, as clerk, entitled under the statute to a fee of fifty cents for each of these five several entries? The proper answer to this question depends, as it seems to us, upon the construction to be given to the items, numbered 6 and 7 as above, in said section 5. In construing these two items in connection with the other items above quoted, it must be borne in mind that the recognized rules for the construction of statutes require that they should be so construed as to give a reasonable effect to every part, if they are capable of such construction, and that we must not suppose that words have been used which were intended to import nothing. *Stayton v. Hulings*, 7 Ind. 144; *Lovejoy v. Robinson*, 8 Ind. 399; *Zorger v. The City of Greensburgh*, 60 Ind. 1.

“It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms.” 1 Kent Com. 461.

It is very clear, we think, that the items numbered 4 and 5 as above, in said section 5 of the fee and salary act, relate to and provide for the same subject-matter, namely, copies, transcripts or exemplifications of any record or paper remaining in the clerk's office. If the copy required contain less than five hundred words, the clerk is authorized, by said item numbered 5, to charge a fee of fifty cents therefor; but, if it contain five hundred or more words, then he is authorized, by item numbered 4 as above, to charge for each one hundred words of such copy a fee of ten cents.

It is equally clear to our minds, that the items numbered 6 and 7 as above, in said section 5, relate to and provide for the same subject, namely, entries in the order book or complete record. Thus, if the entry contain less than five hundred words, we think that the clerk is authorized, by the true intent and meaning of said item numbered 7 as above, to charge a fee of fifty cents for any such entry, but if the entry contain five hundred, or more words, then the clerk is authorized by said item numbered 6 as above, to charge for each one hundred words in such entry a fee of ten cents.

It will be observed, that these two items, 6 and 7, are coupled together by a copulative conjunction, in the same manner as the items numbered 4 and 5 as above. If the item numbered 7 were literally construed, it would be a vain and empty repetition of the item numbered 5 as above, and nothing more, and no effect whatever would or could be given to it, beyond what was already accom-

Sutton v. Parker et al.

plished by said item numbered 5. We are satisfied that it was the intent and meaning of the Legislature, in the enactment of said item numbered 7 as above, to provide, that, if the number of words in any entry in the order book or complete record were less than five hundred words, the clerk should be entitled, for each such entry, to a fee of fifty cents. By giving this construction to said item numbered 7 as above, we give force, effect, and meaning, as well to said item as to item numbered 5 as above, and we arrive at what we regard as the legislative intent in the enactment of both of said items.

The construction we have given to the items last considered, in said section 5 of the fee and salary act of March 12th, 1875, is not only sustained by the general rules for the construction of statutes, but also, as we think, by the subsequent legislation of the General Assembly of this State on the same subject-matter, in the recent fee and salary act, approved March 31st, 1879. In section 16 of the act last referred to, in fixing the fees of the "Clerks of the Circuit, Superior and Criminal Courts of this State," it is provided, among other things, that the clerk shall have a certain fixed fee, "For entering on the order book each order and minute of the proceedings of the court during term, and reading the same, including the title of the cause, [when] the number of words in such entry is less than three hundred words, *for each entry*, 25 cents." Acts of Reg. & Spec. Sess. 1879, p. 132. This statutory provision tends, we think, to some extent at least, to show that it was the intention of the General Assembly, in the legislation on the same subject as in said section 5 of the act of March 12th, 1875, to provide that the clerk should be entitled to a fixed fee "for each entry" on the order book, where the entry contained less than a given number of words.

In our opinion, the court below erred in its conclusion

Ex Parte Laboyteaux.

of law upon the facts specially found, in this, that the court should have found, as its conclusion of law upon those facts, that the appellant, as clerk, was entitled, under the statute then in force, to the fixed fee of fifty cents for each of the said several entries on the order book, and that, in so far as those several entries are concerned, the appellant's taxation of the costs was correct and fully authorized by the plain intent and meaning of the statute.

In so far as the entry on the fee book is concerned, we do not find any provision in the act of March 12th, 1875, which would entitle the appellant, as clerk, to any higher or different fee for this entry, than the court below has allowed him, to wit, ten cents for each one hundred words, counting four figures as a word, in said fee-book entry.

The judgment is reversed, at the appellees' costs, and the cause is remanded, with instructions to the circuit court to make its conclusion of law, upon the facts found, in accordance with this opinion, and render judgment accordingly.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

EX PARTE LABOYTEAUX.

LIQUOR LAW.—*Act of 1875.—Section 8 Construed.—Inhabitant.—Application, Notice and Evidence of Applicant for License.*—The words "Any male inhabitant," etc., in section 8 of the act of March 17th, 1875, 1 R. S. 1876, p. 869, concerning the sale of intoxicating liquors, mean any male inhabitant of this State, etc.; and neither the application, notice nor evidence on behalf of an applicant for a license under such act need show that he is a resident of the town, township or county where he desires to sell.

From the Wayne Circuit Court.

Ex Parte Laboyteaux.

F. W. Fitzhugh and S. A. Forkner, for appellant.

NIBLACK, J.—On the 5th day of February, 1879, James Laboyteaux filed in the Auditor's office of Henry county his petition in writing, as follows :

“To the Honorable Board of Commissioners of the County of Henry and State of Indiana :

“The undersigned, respectfully petitioning, sheweth to your honorable body the following : That he is a male inhabitant of Henry county, State of Indiana, is over and above the age of twenty-one (21) years, is a man of good moral character, is not in the habit of becoming intoxicated, and is, in all respects, a fit and proper person to be entrusted with a license empowering him, said petitioner, to sell and barter, in less quantities than a quart at a time, spirituous, vinous, malt and other intoxicating liquors, with the privilege of permitting the same to be drank in and upon the premises where sold and bartered.”

Then followed a very careful description of the kind, and precise location, of a house in the town of Knightstown, in said county of Henry, in which it was proposed to barter and sell spirituous, vinous, malt and other intoxicating liquors, to be drank on the premises, if a license so to do should be granted, concluding with,—“Petitioner further says, that he has given due and legal notice of his making this application, by publishing in the Newcastle Courier, a weekly newspaper printed and published in said county, and of general circulation therein, a notice specifically setting out his intentions in this behalf, and particularly describing the premises wherein and upon which the privileges conferred by the license prayed for are to be exercised and enjoyed. A copy of said notice, duly verified, is hereunto appended, marked ‘Exhibit A ;’ said notice being duly published more than 20 days prior to the first day of this term of your honorable board.”

This was followed by a prayer that a license might be

granted to the petitioner, authorizing him to barter and sell spirituous, vinous, malt and other intoxicating liquors, in less quantities than a quart at a time, to be drank on the premises, at the place described in the petition, averring the petitioner's readiness to execute a bond, and to pay the money for such license, required by law.

A verified copy of a notice, in substance the same as the notice described as above, was filed with and accompanied the petition.

At the March term, 1879, of the said board of commissioners an attorney, practising before said board, moved to dismiss the petitioner's application for a license, on account of the alleged insufficiency of the notice, and his motion was sustained.

The petitioner then appealed to the Henry Circuit Court, and on his application the venue was changed to the court below. In this latter court, an attorney, claiming to act as *amicus curiæ*, moved to dismiss the petitioner's application for a license, because the petition did not show that he, said petitioner, was a resident of Knightstown, or of the township in which said town is situated. This motion was also sustained, and a judgment of dismissal was rendered against the petitioner.

The only question either presented or discussed here arises upon the decision of the court below dismissing the appellant's petition.

By the act of March 17th, 1875, 1 R. S. 1876, p. 869, authority is conferred on the boards of commissioners of the several counties to grant license to sell spirituous, vinous, malt and other intoxicating liquors.

By section 3 of that act it is provided, that "Any male inhabitant over the age of twenty-one years, desiring to obtain license to sell intoxicating liquors, shall give notice to the citizens of the township, town, city or ward in which he desires to sell, by publishing, in a weekly news-

Ex Parte Laboyteaux.

paper in the county, a notice, stating in the notice the precise location of the premises in which he desires to sell, and the kind of liquors, * * * * * at least twenty days before the meeting of the board, at which the applicant intends to apply for a license; or, in case there is no such paper published in the county, then by posting up written or printed notices in three of the most public places of the township in which he desires to sell, at least twenty (20) days before the meeting of such board. And it shall be the privilege of any voter of said township to remonstrate, in writing, against the granting of such license to any applicant on account of immorality or other unfitness, as is specified in this act."

Conceding that it was necessary, under the act of March 17th, 1875, to make an application in writing, in order to obtain a license under its provisions, a question which we do not now decide, was the failure of the petition to allege that the applicant was a resident of Knightstown a fatal omission? We can not say that it was. We are unable to give the section of the statute above set out so narrow a construction. That section says that *any male inhabitant* having certain other qualifications may obtain a license by certain proceedings which it prescribes. That designation applies alike, we think, to all the male inhabitants of the State, of the class to which a license may be granted, without reference to their residence in any particular place in the State.

The act of February 27th, 1873, required that an applicant for a permit under it should be a resident voter of the county in which he made his application, but did not provide that he should be a resident of the ward, town or township for which he desired the permit.

As has been seen, the act of 1875, which took the place of that of 1873, does not, by its terms, provide that the applicant shall be a resident either of the county in which he

The Franklin Insurance Company of Indianapolis v. Humphrey *et al.*

makes his application or of any other subdivision of the State, and hence we must construe the act of 1875 to be less restrictive, as regards the residence of the applicant, than was the act of 1873, and not to require the applicant to be a resident even of the county in which he desires to obtain a license. As to such residence, it is sufficient, in our estimation, if it be shown that he is an inhabitant of the State.

The rule of construction laid down in the case of *Mark v. The State, ex rel.*, 15 Ind. 98, in relation to resident householders of the State seems to us to apply to the question of inhabitancy involved in this case.

We see no substantial objection either to the petition before us or to the notice accompanying it. We are of the opinion, therefore, that the court below erred in dismissing the petitioner's application.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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| 164 | 598 |

THE FRANKLIN INSURANCE COMPANY OF INDIANAPOLIS v.
HUMPHREY ET AL.

FIRE AND MARINE INSURANCE.—Wharf-Boat.—Loss by Ice.—Terms of Policy.—An insurance company issued a policy to the assured, in a certain sum, "against loss or damage by fire, * on his wharf-boat, tackle and apparel lying at the wharf of the city of Evansville, Indiana, * and to receive, discharge and store freight, hazardous, extra-hazardous and specially hazardous. It is understood that the loss, if any, shall be adjusted according to the conditions herein contained, and those hereto attached." The conditions "attached" were as follows, viz.: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves."

The Franklin Insurance Company of Indianapolis v. Humphrey et al.

Held, in an action on the policy, that the company was liable for a loss occurring by means of ice floating against and destroying the boat insured.

SAME.—Evidence of Custom.—Removal to Ice Harbor.—Evidence in such action was inadmissible to prove a custom prevailing at Evansville of removing property of the character of that insured from that place to a neighboring ice harbor, for safety during the season of "running ice."

SAME.—Notice by, and Assent of, Company, to Remove.—Evidence was likewise inadmissible in such action, to prove a notice, by the company to the assured, to so remove the property assured, an offer by the company to accept the risk occasioned by the removal, and that such removal would have been safe.

SAME.—Fraud.—Negligence.—The failure of the defendant, even though wilful, to so remove the property insured, constitutes neither fraud nor negligence.

From the Posey Circuit Court.

C. A. DeBruler and E. R. Hatfield, for appellant.

A. Iglehart, J. E. Iglehart, A. Gilchrist and C. H. Butterfield, for appellees.

BIDDLE, J.—Suit by the appellees, upon an insurance policy alleged to have been made by the appellant to Francis M. Humphrey, for the benefit of his mortgagees, insuring a wharf-boat against loss or damage by fire, and other perils, averring, that, by a large sheet of ice floating in the Ohio River, the boat was carried away, wrecked, burned and wholly destroyed, without the fault or negligence of the appellees.

A demurrer, alleging the want of facts sufficient to constitute a cause of action, was overruled to the complaint, and exception reserved.

Answer in five paragraphs.

The first paragraph avers, in substance, that, long before the loss happened, the Ohio River, in which the wharf-boat was lying, at Evansville, became encumbered with floating ice to such an extent that it became dangerous and hazardous to permit the wharf-boat to remain longer where it was, because, if the river closed, the breaking up of the ice would almost certainly sink and destroy the

The Franklin Insurance Company of Indianapolis v. Humphrey *et al.*

boat; that Humphrey, the assured, was the master and owner of the wharf-boat, and in the actual control and possession thereof, and that, under the circumstances, it became his duty to remove it to a place of safety; that Green River, which empties into the Ohio at a point about eight miles above Evansville, is such a place of safety, being a perfect ice harbor, and is the nearest and most accessible place of safety that could be found, and that, on the 18th of December, 1876, the insurance company gave Humphrey a written notice to remove the wharf-boat into Green River, and by its agent frequently requested him verbally to do so, and warned him that the boat would be sunk if permitted to remain longer where she was; and that, for ten days after such notice was given, the wharf-boat could have been easily and safely towed to Green River, and moored therein, and thenceforth would have been perfectly safe; and if that had been done the loss would not have occurred; that Humphrey carelessly and negligently failed and refused to move the boat until the river became completely frozen over, and that, when the ice broke up, on the 16th of January, it was carried by the current in large masses against the wharf-boat, tore her loose and destroyed her; and, therefore, that the loss occurred through the gross negligence of the assured (who was master and owner), and the company is not liable.

The second paragraph is the same, except that the refusal of Humphrey to take the boat to Green River is charged to have been fraudulent, the language being as follows:

“ But the said Humphrey fraudulently intending and designing that the said wharf-boat should be sunk by the ice, in order that he might recover the insurance money thereon, purposely kept said wharf-boat in said exposed and dangerous locality, well knowing that the same would be sunk when the ice broke up in the Ohio River, and so

The Franklin Insurance Company of Indianapolis *v.* Humphrey *et al.*

fraudulently and designedly suffered said wharf-boat to remain at the wharf at Evansville aforesaid, so that, when the ice, at the time mentioned in the complaint, to wit, January 16th, 1877, broke up in said Ohio River, it was carried by the current in large masses against said wharf-boat," etc., "and destroyed it; whereupon defendant says that the loss occurred by the connivance, purpose and design of said Humphrey," and that it is not liable.

The third paragraph of the answer is a general denial.

The fourth paragraph avers, precisely as the first and second, the facts in regard to the condition of the river, the danger and hazard of permitting the wharf-boat to remain at Evansville, the practicability of towing her to Green River, and the duty of Humphrey, in the exercise of ordinary care and diligence, to take her there; the safety of Green River ice harbor, the notice by the company to Humphrey, both written and verbal, to take her to Green River, and the warning that, if permitted to remain at Evansville, she would inevitably be destroyed; and that the company also "notified the plaintiffs, that, unless they so moved the said wharf-boat, the defendant would not be responsible for the loss thereof, and notified the plaintiffs that the defendant company would take all the risks of loss attending the removal of said wharf-boat to a place of safety;" and it is then alleged that the plaintiffs agreed and promised to take the boat to Green River; that, for ten days thereafter, it could easily and safely have been so taken, and that it would then have been safe; but that plaintiffs negligently failed and refused to move it, and so it was destroyed by the ice, when, if their promise to remove it had been kept, the loss would not have happened.

The fifth paragraph of the answer recites a provision of the policy, by which it is made the duty of the assured to labor in and about the safeguard and protection of the said wharf-boat in case of any misfortune happening, and

The Franklin Insurance Company of Indianapolis v. Humphrey *et al.*

it is then averred, that, three days before the wharf-boat was carried down the river, it broke loose from the place where it was moored, and was caught by other parties than the assured, tied to the shore, and possession taken by the assured and watchmen placed in charge; but that the assured, Humphrey, designing that the boat should be lost, negligently and fraudulently failed to fasten the boat to the shore, and although, as Humphrey well knew, it was necessary to fasten it to the bank with more than one line, or with chains, or both, as was usual and customary, he fastened her with only one line, and that an old and rotten one; that the line broke, the watchman abandoned the boat, and so she floated fifty miles down the river, was then caught and tied, and afterwards burned, "said Humphrey having in no wise taken any care thereof."

A reply in several paragraphs was filed to the answer; issues joined; trial by jury; verdict for appellees; judgment on the verdict; and appeal to this court.

By a motion for a new trial, and the demurrer to the complaint, the appellant has presented several questions for our consideration.

1. As to the sufficiency of the complaint:—

It is not claimed that the complaint lacks any necessary averment, or that any averment which it contains is insufficient; but it is insisted that the policy declared upon does not cover a loss by the means averred in the complaint; that it insures only against loss or damage by fire, and does not insure against a loss by the perils of the Ohio River.

The language of the policy is as follows:

"By this policy of insurance the Franklin Insurance Company of Indianapolis, Ind., in consideration of the receipt of one hundred dollars, do insure F. M. Humphrey against loss or damage by fire to the amount of two thousand dollars, on his wharf-boat, tackle and apparel lying at

The Franklin Insurance Company of Indianapolis v. Humphrey et al.

the wharf of the city of Evansville, Indiana, privilege \$4,000, total insurance, and to receive, discharge and store freight, hazardous, extra hazardous and specially hazardous. It is understood that the loss, if any, shall be adjusted according to the conditions herein contained, and those hereto attached."

The conditions attached were as follows :

" Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves."

It appears from an averment in the complaint, and by the argument of the appellant, that the parties adopted the form of a fire policy, and that the conditions thereto " attached " were adopted from the form of a marine policy, thus making it really both a fire and marine policy. This, doubtless, accounts for its apparent incongruity. Upon this ground, the appellant argues that " there are no direct words of insurance against marine perils to be found in the contract ; " that " the wharf-boat was not built to make voyages, but to serve as a floating warehouse for the storing of freight ; " that " no voyage was contemplated, or in the nature of the case could be made, and hence the ' adventures and perils ' enumerated were never in fact assumed by the company." But we are unable to view the policy in that light. The fair construction and plain meaning of the policy, when all its parts are taken together, is, that the appellant insured the wharf-boat of the appellee Humphrey " against loss or damage by fire," and against loss or damage by the perils " of the seas, lakes, rivers, canals, jettisons, rovers and assailing thieves." The fact that the wharf-boat was not adapted to navigation, and could not, and was not intended to, make voyages, or enter upon the seas, lakes or canals, but was insured " lying at the wharf of the city of Evansville, Ind.," in the Ohio River, will not

The Franklin Insurance Company of Indianapolis v. Humphrey *et al.*

vitiating the policy as to other perils; and the insurance against "jettisons, rovers and assailing thieves," might be as applicable to a wharf-boat as to a boat calculated to make voyages. That the destruction of the boat by the ice, as averred, was by a peril of the Ohio River, is not disputed. We think the complaint is sufficient.

2. On the trial, after the appellees had rested, the appellant introduced as a witness John H. Morris, who was duly sworn, and by whom appellant offered to prove the following facts:

"That witness was the owner and master of the tow-boat 'Hotspur,' and had his boat at Evansville when ice began to form and float in the Ohio in December, 1876; that Green River empties into the Ohio eight miles above Evansville, and is a perfect ice harbor and peculiarly adapted to the safety of boats threatened by the ice, and the only ice harbor on the Ohio within reach; that this fact was well known and universally understood among all river men, and that it is, and was in December, 1876, and has been from time immemorial, the well understood, universal, and perfectly well known custom among all river men, owners and masters of wharf-boats, etc., to take all such boats and wharf-boats to the mouth of Green River upon the approach of danger from floating ice in the Ohio River, and that such custom and usage was in full force on the 4th day of November, 1876, and was well known to all river men and all business men generally, in the city of Evansville; that, at any time in the month of December, 1876, up to the 25th, Humphrey's wharf-boat—the subject of the insurance in this action—could easily have been towed and taken by the said tow-boat 'Hotspur' to Green River; that said 'Hotspur' was, during the month of December, 1876, at various times up to the 25th, engaged in towing various crafts to the mouth of Green River, from the wharf at Evansville, and on Sunday, De-

The Franklin Insurance Company of Indianapolis v. Humphrey et al.

cember 18th, 1876, did so tow a large wharf-boat owned by Rankin & Co., and a few days thereafter another large wharf-boat, and that Humphrey's boat, the one in controversy, would not have been much harder to tow than either of those; that said Humphrey did procure another wharf-boat, owned by him, to be towed to Green River in December, 1876, about the middle of the month; that ice began to form in the Ohio about December 8th, 1876, and that, at many times thereafter, the river was clear of ice between Evansville and Green River, before the loss complained of happened; that witness has been engaged in river business, in various capacities, for the past ten years."

This testimony was objected to by the appellees, and excluded by the court, to which appellant excepted.

The facts above stated, and offered to be proved, lack some of the essential requisites necessary to the validity of a particular custom at common law, as that it was continued without interruption, was peaceable and acquiesced in, and was compulsory and binding upon all, and lack an additional and important requisite to make it binding in this State, namely, that it was coextensive with the State. Perhaps it is not within the constitutional power of the Legislature in this State to make such a particular and local custom binding save by express statute; much less, then, could it be upheld by the common law. *The Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Spears v. Ward*, 48 Ind. 541. But the most palpable objection to the evidence offered is, that it would tend to contradict the written terms of the policy which insured the wharf-boat "lying at the wharf in the city of Evansville, Ind.," and did not insure it lying in the mouth of Green River, Kentucky, nor on its passage from where it was insured, to and from the mouth of Green River. It is not contemplated that a wharf-boat, which is a floating dock and warehouse com-

The Franklin Insurance Company of Indianapolis v. Humphrey et al.

bined, for the purpose of receiving, storing and shipping goods, is to be removed from the waters in which it is built, and the place to which it is adapted. The owner is entitled to the use of his wharf-boat at the place where it is designed to remain, as well in the winter time, if he then can and desires to use it, as he is during the boating season; and it might be that a removal of the wharf-boat, as contemplated by the facts offered to be proved, if made without the consent of the insurer, would have been such a deviation from the proper use of the boat, as to avoid the policy, if it had been lost at any other point than that at which it was insured, and where it was designed to remain.

The appellant has offered much argument, and cited many authorities, to show us, that, where the loss of insured property is caused by the wrongful act of the insured party, he can not recover on the policy. We are not differing from the appellant in this view, but the facts offered to be proved in this case, do not tend to show a wrongful act on the part of the appellees, nor even negligence. Wood Ins., pp. 108 and 221, and authorities there cited; May Ins. 493, 499; *Copeland v. New England Marine Ins. Co.*, 2 Met. 432; *The City Fire Ins. Co. of N. Y. v. Corties*, 21 Wend. 367; *Dixon v. Sadler*, 5 M. & W. 405; *Leeds v. The Mechanics' Ins. Co.*, 8 N. Y. 351; *Equitable Ins. Co. v. Hearne*, 20 Wal. 494; *Ins. Co. v. Wilkinson*, 13 Wal. 222; *Cincinnati Mutual Ins. Co. v. May*, 20 Ohio, 211; *Hill v. Portland & Rochester R. R. Co.*, 55 Me. 438; *Mickey v. The Burlington Ins. Co.*, 35 Iowa, 174; *Luce v. Dorchester Ins. Co.*, 105 Mass. 297; *Dudgeon v. Pembroke*, 10 Eng. R. (Moak's Notes) 192; *Gove v. The Farmers' Mutual Fire Ins. Co.*, 48 N. H. 41; *Huckins v. The People's Mutual Fire Ins. Co.*, 11 Foster, N. H. 238; *Howland v. The Marine Ins. Co.*, 2 Cranch C. C. 474; *Hazard's Adm'r v. The New England Marine Ins. Co.*, 8 Peters, 557.

The Franklin Insurance Company of Indianapolis *v.* Humphrey *et al.*

3. The appellant then offered to read to the jury the following statement of an absent witness, John B. Hall, embodied in an affidavit for a continuance, filed by the appellant, and which statement the plaintiffs, before going into the trial, had agreed and admitted in open court, the said witness, John B. Hall, would testify to if he were present, to wit: "That the wharf-boat which is the subject-matter of the insurance herein, and for the recovery of the amount insured on which this action is brought, could, without risk or danger of the same being destroyed, have been towed to Green River, which was a place of safety, eight miles or thereabouts distant from the city of Evansville, at any time after the ice first made its appearance in the Ohio River, in December, 1876, until the 30th of said month; that tow-boats of sufficient power were at the port of the city of Evansville, and their services could have been procured to have towed said wharf-boat of plaintiffs to Green River, during the time aforesaid; that the weather during said time was calm, and there was no reason to apprehend disaster from wind, and that the stage of water in the Ohio River, between Evansville and Green River aforesaid, was sufficient for the said boat to be so towed to said place of safety; that all other wharf-boats and steamboats of any considerable size, which had been lying at the wharf at Evansville, had been removed during the time aforesaid to a place of safety; that, from the time ice first appeared in said month of December, 1876, in the Ohio River, it was apparent to all men who had knowledge of the river and its dangers, that there was great danger to be apprehended in leaving a wharf-boat at the wharf at Evansville; that the plaintiff Francis M. Humphrey was personally in charge of said wharf-boat, and had full and complete control of the same, and that it was his duty, in the exercise of ordinary care and prudence, for the purpose of preventing injury to said wharf-boat, to have removed the same during the time aforesaid, to a place of safety.

The Franklin Insurance Company of Indianapolis v. Humphrey et al.

This evidence, also, was excluded by the court, upon objection of appellees, and appellant excepted.

This proposition, in principle, is the same as the second, which we have fully considered. It is not necessary, therefore, to examine the question further. The next proposition made by the appellant is also the same, and need not be stated nor considered.

4. Appellant then offered to prove by Franklin L. Whicher, a competent witness, that said Whicher was the agent of appellant at Evansville, in December, 1876, and, as such agent, on the 18th of that month, served on the appellees the written notice mentioned in the pleadings, and frequently, from the 18th to the 30th of said month, notified Humphrey to move the wharf-boat to Green River, and offered that such removal might be made at the risk of the insurance company; and also offered to read to the jury the written notice served by Whicher, its agent, on Humphrey, on the 18th of December, requesting him to take his boat to Green River, and warning him of imminent danger from the ice; and also offered to prove by John C. Shoemaker, President of the Franklin Insurance Company, that the company, at the time, ratified and approved of the act of its agent, Whicher, in notifying appellees to move the wharf-boat; but, upon objections by appellees, the court excluded the evidence, and appellant excepted.

We have seen that there was no valid particular custom, requiring Humphrey to move his wharf-boat to the mouth of Green River, and there is no general law requiring him to do so. There is no stipulation in the policy binding him to do so, and he was not bound to do so upon the notification of the appellant, and he was not bound to accept new terms of insurance, varying the policy, although offered by the company. The wharf-boat was built at the wharf at the city of Evansville, to be used at that place; it was not adapted to be removed to the mouth of Green

The Franklin Insurance Company of Indianapolis v. Humphrey et al.

River, although it might have been practicable to take it there; and at that place it might have been, and probably would be, useless to the owner while it remained. We think the owner had a right to have his boat remain in the waters where it was built, and to use it at that place for the purposes to which it was adapted. The policy insured the boat against the perils of the river at that place, and not against the lesser perils that might overtake it in the mouth of Green River.

5. The appellant discusses the question of fraud set up in the second paragraph of answer, and insists, that, although the facts offered to be proved might not amount to anything more than negligence which would not prevent Humphrey from recovering on the policy, yet, when a fraudulent purpose and corrupt design entered into his conduct by which he desired that the boat should be lost, "in order that the insurance money might be recovered," they amount to fraud which will prevent him from recovering on the policy; but if Humphrey, as we have held, had a right to keep his boat at the wharf in the city of Evansville, his motive, intention or purpose in doing so could not vitiate his acts. Fraud can not be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of.

It seems to us that the questions in this case have been thoroughly discussed, that the case has been well tried, and that the judgment is in accordance with the law and the facts. It is therefore affirmed, at the costs of the appellant.

 Britz *et al.* v. Johnson *et al.*

BRITZ ET AL. v. JOHNSON ET AL.

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SUPREME COURT.—*Record.*—*Action to Recover Real Estate.*—*Trial on Substituted Complaint.*—*Special Finding.*—The record, in the Supreme Court, of an action to recover real estate, showed a trial of the cause by the court, upon the issues formed upon the original complaint, but that, without any finding having been made, a substituted complaint and an answer thereto were filed; that trial was had and judgment rendered thereon for the defendant; and that, on a new trial as of right, by the court, a general and a special finding were made, and judgment rendered by the court, for the defendant.

Held, that the original complaint and answer, though copied into the transcript, form no part of the record.

Held, also, neither the substituted complaint, the answer thereto, nor the evidence being in the record, that the Supreme Court can not say that the special finding was not within the issues.

SAME.—*Purchase Pendente Lite.*—*Presumption.*—One fact of such special finding being that the plaintiff had purchased the real estate in question at a sheriff's sale thereof, made after the filing of the complaint and the issue of process in an action by this defendant, against a third person, to recover such real estate, resulting in a judgment for the former, the Supreme Court is bound to presume, in the absence of any thing in the record to the contrary, in favor of the finding and judgment below.

From the Jefferson Circuit Court.

E. P. Ferris and *W. W. Spencer*, for appellants.

PERKINS, J.—The record of this cause shows, that, on the 9th day of April, 1872, the appellants commenced a suit to recover a lot or parcel of ground, situate in Madison, Jefferson county, Indiana; that the cause was put at issue at the October term of said court, 1872, and, on the twenty-fifth judicial day of said term, was tried, and taken under advisement by the court; that "afterward, to wit, on the 14th day of August, 1873, the same being the third judicial day of a special term of said court, commencing on the 12th day of August, 1873, before the Hon. JOHN G. BERKSHIRE, judge *pro tem.* of said court, the following further proceedings were had in said cause, to wit: Come the parties, and the plaintiff files substituted

Britz et al. v. Johnson et al.

complaint herein, and defendants are ruled to answer; that afterward, on the 15th day of August, 1873: Come the parties, and the defendants file answer herein, and this cause, being at issue and ready for trial, is submitted to the court," etc.

The court found for the defendants.

The plaintiffs paid the costs, and took a new trial under the statute.

The record further shows, that, without any further change in the pleadings or issues, on the 22d day of May, 1876, this case was submitted to the court for trial, without the intervention of a jury, and the court found generally for the defendants, and also made a special finding of facts, and stated conclusions of law thereon. The plaintiffs appeal to this court.

The pleadings upon which the cause was first tried are not legally in the record. They had been superseded by substituted pleadings. It is enacted by statute, 2 R. S. 1876, p. 242, sec. 559, as follows:

"Neither shall the clerk certify any pleading first filed, when there is an amended pleading of the same matter subsequently filed, embracing all the pleading first filed, and the amendments thereto; but shall certify such amended pleading only."

The case before us falls within this provision of the statute.

A "substituted complaint," *ex vi termini*, imports a complaint filed to take the place of that previously filed, and excludes such previous complaint from the record as an operative pleading in the cause. The answers filed to such superseded complaint, and the issues formed thereby, would necessarily fall, when that complaint was superseded by the complaint substituted in its place.

It will be observed, that the complaint substituted did not simply take the place of the prior complaint in the line of pleading, without changing the issue; but a rule

Britz *et al.* v. Johnson *et al.*

was taken to answer the substituted complaint, and an answer to it was filed, forming a new issue, upon which the cause was tried. The substituted complaint and answer are not in the record. The pleadings upon which the case was tried not being in the record, we can not properly decide upon the errors assigned, and might, therefore, at this point, affirm the judgment. We think, however, that it may be more satisfactory to the parties, and certainly will be to the court, to present a little more fully the reasons why we can not decide questions going to the merits of the cause.

The circuit court made a special finding of facts, in which it was found that the plaintiffs in this suit, the appellants here, purchased the real estate they are seeking to recover in this suit, at a sheriff's sale, while a suit by the appellees, "to recover the said real estate," duly commenced by the filing of a complaint and the issue and service of summons thereon, was pending, in which suit the appellees recovered said real estate. Holding that suit to have been notice, by *lis pendens*, that court found in favor of the appellees, and against the purchasers, the appellants, at said sheriff's sale, said appellees proving title thereto, according to the special finding.

The appellants complain of that finding.

We can not judge of its correctness without having those proceedings, and the evidence that may have been given in connection with them on the trial of the cause now before us. We can not say that the special finding was not within the issues of the cause, they not being before us, and did not support the allegations of the complaint, and was inconsistent with the general finding.

The character of *lis pendens* which may affect the title of a purchaser is well defined. There must be a suit pending, and the complaint in the suit must disclose the subject-matter of it. In the suit pending when the appel-

Britz *et al.* v. Johnson *et al.*

lants purchased the property in question, the complaint in it had been filed and process issued. It is enacted, 2 R. S. 1876, p. 46, sec. 34, that an "action shall be deemed to be commenced from the time of issuing the summons," or, "as to those against whom publication is made, from the time of the first publication," a complaint having been previously filed. The suit mentioned was pending, within the provision of our statute. But as to what title to the property was it pending?

In *Leitch v. Wells*, 48 N. Y. 585, it is decided, that:

"The commencement of an action by the service of a summons does not create a *lis pendens* affecting third persons not parties to the action. To bind a purchaser *pendente lite* by the judgment, there must also be a bill or complaint on file at the time of his purchase, in which the claim upon the property is set forth." 1 Perry Trusts, sec. 223.

As we have said, the pleadings in the case at bar are not before us, and we can not, therefore, say, with certainty, what was the scope of the issues tried in the cause, nor what were the allegations in the pleadings, nor what was the evidence on which the court made its finding. Nor does the clerk of the circuit court, as contemplated by the provisions of the statute, certify that the transcript filed in the cause, in this court, contains copies of "all papers pertaining to the cause and filed therein," except, etc. 2 R. S. 1876, p. 242, sec. 559.

It is inferable, from what appears in the record, that the suit pending "to recover the real estate" mentioned in the special findings was to recover, not the possession merely, but the real estate, on the ground of fee-simple title thereto. That is the natural meaning of the words, "to recover the real estate." If such was the case, and *prima facie* it was, the judgment below was right, and it devolves upon the appellant to show that it was wrong;

Adams v. The State.

and it is his fault that we have an imperfect transcript of the record alone before us.

We take it, that, where the transcript of a record in this court, on appeal, shows that matters were, or might have been, before the court below, which would have justified the action of that court, it devolves upon the party seeking to reverse that action, to take care that such matters as were before that court are placed before this court, that it may see that they did not justify the rulings and decisions of such lower court.

Where, in such cases as this, it is shown that the judgment of the court below might have been correct, it will be presumed to have been so till the contrary is made to appear.

The judgment is affirmed, with costs.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

ADAMS v. THE STATE.

CRIMINAL LAW.—Involuntary Manslaughter.—Murder.—On the separate trial of a defendant indicted jointly with B. and others for murder, the evidence established substantially, that an altercation had taken place between the deceased and B., during the evening on which the former was killed ; that the deceased, having left the parties indicted, got into an altercation with another, displaying a pistol and threatening to shoot any one interfering with him ; that subsequently the parties indicted came up to the deceased, who was immediately struck by B. ; that, though the deceased denied having a pistol, the defendant and the other parties indicted, at the request of B., undertook to assist him in disarming the deceased ; and that, during the scuffle, and immediately upon B.'s exclaiming that he had obtained the pistol, it was discharged, killing the deceased.

Held, that B. was guilty, if at all, of involuntary manslaughter only.

Held, also, that the defendant was not guilty.

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Adams v. The State.

SAME.—Instruction.—Failure to Instruct Fully.—The court, after reciting the statutory definition of manslaughter, instructed the jury trying such cause, “that, in manslaughter and in murder, there is the common element of intent to kill. The distinction is, that in murder malice, either express or implied, is present, while in manslaughter it is absent. * The intention to kill must grow out of hot blood, in order to reduce an unlawful homicide to the grade of manslaughter.”

Held, that, in the absence of a request by the defendant, and a refusal by the court, to instruct as to involuntary manslaughter, he can not complain of the instruction.

SAME.—Voluntary and Involuntary Manslaughter Distinguished.—In voluntary manslaughter the killing is intentional, while in involuntary manslaughter the killing is unintentional, but in the commission of an unlawful act.

SAME.—One indicted for voluntary manslaughter can not be convicted on proof that he is guilty of involuntary manslaughter.

SAME.—Aider or Abettor.—There can be no aider or abettor in the commission of involuntary manslaughter.

From the Owen Circuit Court.

W. M. Franklin, for appellant.

T. W. Woollen, Attorney General, *S. O. Pickens*, Prosecuting Attorney, and *I. H. Fowler*, for the State.

Howk, J.—At the September term, 1878, of the Owen Circuit Court, an indictment was duly returned by the grand jury of said court and term, wherein it was charged, in substance, that, “at the county of Owen and State of Indiana, on the 21st day of September, 1878, one James Patterson, Charles Patterson, William Anderson and John Byrant did then and there unlawfully, in and upon the body of one Anthony White, a human being, feloniously, purposely and with premeditated malice, make an assault, and with a pistol loaded with gunpowder and leaden bullet, which they, the said James Patterson, Charles Patterson, William Adams and John Bryant, in their hands then and there had and held, him, the said Anthony White, feloniously, purposely and with premeditated malice, did shoot, strike and mortally wound, from which said wound, so inflicted as aforesaid, the said White

Adams v. The State.

then and there instantly did die, and so the grand jurors aforesaid, upon their oath as aforesaid, do charge that the said James Patterson, Charles Patterson, William Adams and John Bryant, him, the said White, by the means and in the manner aforesaid, then and there, feloniously, purposely and with premeditated malice, did kill and murder, contrary to the form of the statute," etc.

The defendants named in said indictment jointly moved the court to quash it, which motion was overruled, and they jointly excepted. Upon arraignment, they entered a joint plea of not guilty to the indictment, and they then elected to be tried thereon separately and severally.

The issues joined as to the appellant, William Adams, were submitted to a jury for trial, and a verdict was returned, finding him guilty of manslaughter, and assessing his punishment at twelve years in the state-prison. His motion for a new trial was overruled by the court, and his exception was entered to this decision, and judgment was rendered on the verdict.

In this court the appellant has assigned, as error, the decision of the circuit court in overruling his motion for a new trial. In this motion the following causes were assigned for such new trial, to wit :

"1st. That the verdict of the jury is contrary to law ;

"2d. That the verdict is contrary to the evidence ;

"3d. Error of the court in giving instructions 1 to 23 inclusive, and each of them ; and,

"4th. Error of the court in refusing to give instructions asked by the defendant, numbers 1 to 3 inclusive, and each of them."

We may properly remark in the outset, that no point is made in this court upon the fact, apparent in the record, that the name of the appellant is given in the charging part of the indictment, as William Anderson, instead of

Adams v The State.

William Adams. This latter name is the one in which he pleaded and was tried, and the name of William Anderson, where it appears, is probably a clerical error in transcribing the indictment into the record, and we will so consider it.

We give, from the brief of the appellant's counsel, the following statement of the facts attending the killing of Anthony White, at Fredonia, Owen county, Indiana, on the night of September 21st, 1878, upon which the indictment against the appellant and his codefendants, in this case, was predicated, which statement of facts the attorneys for the State admit to be substantially correct :

"The circumstances of the killing were about these: There was a public political meeting in the town that night, and also a religious meeting at a church, about a quarter of a mile from the political meeting. The deceased came to the town late that evening, between sundown and dark, considerably intoxicated. The defendant, with the others included in the indictment, came there about dark, and were in a saloon, under where the political meeting was being held, and had all been drinking some. About 7 or 8 o'clock in the evening, the deceased came into the saloon, and drank with James Patterson, one of the defendants. During the time he was so in there, he and James got into a quarrel about paying for the drinks, or something else, about which none of the witnesses could entirely explain, when James wanted to fight, but being prevented from doing so by two of these defendants, his brother Charles and this defendant Adams, and perhaps others, he desisted, and deceased went out of the room. The evidence is then conflicting, as to what took place in reference to what had previously occurred. Deceased then went up to the church, and shortly afterward got into a dispute with one Stephen Goodwin, created considerable confusion there, exhibited a pistol and threat-

Adams v. The State.

ened to shoot any one who interfered with him. The defendants remained in the saloon and around it for some time, when they, with three others, Hoover, Norris and Livingston, also went up to the church. The meeting had just adjourned, and the people were leaving. They passed up into the crowd, where the deceased was. James Patterson, who had had the quarrel with the deceased in the saloon, immediately struck deceased, who stepped back a little and asked who struck him. When James Patterson said, 'He has a pistol, let us take it from him.' Deceased first denied having it. Then James Patterson, Charles Patterson and this defendant seized him to take the pistol from him. The evidence is somewhat conflicting as to what was said and done, while they were trying to take the pistol from him, and after scuffling for a while over the pistol, James Patterson said, 'Now I have it,' and immediately afterward the pistol fired, deceased fell to the ground and very soon expired. He was shot in the back part of the head, the ball ranging inward and downward, and lodged in the base of the brain."

With this statement of the facts of this case, we pass now to the consideration and decision of the questions presented and discussed by his counsel in this court. We pass over the first two causes for a new trial, which relate to the legality of the verdict and the sufficiency of the evidence in support of it, and we will first consider the instructions of the court, which are complained of in argument by the appellant's counsel. The first of the instructions thus complained of is, that one, or it may be parts of two instructions, (for the numbering of the instructions is evidently confused,) in which the court undertook to define manslaughter. The court said:

"Manslaughter is defined, as follows, by the statute: 'If any person shall unlawfully kill any human being without malice express or implied either voluntarily upon

Adams v. The State.

a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter.'” In commenting upon this statutory definition of manslaughter, as distinguished from murder, the court immediately added, in the next instruction, the following explanatory definition of the former grade of homicide: “You will observe that, in manslaughter and in murder, there is the common element of intent to kill. The distinction is, that in murder malice, either express or implied, is present, while in manslaughter it is absent; for, in the latter case, the killing must be done without malice, either express or implied. The intention to kill must grow out of hot blood, in order to reduce an unlawful homicide to the grade of manslaughter.”

It will be seen from the instruction quoted, that the court apparently ignored the idea, that there could be a case of manslaughter, without any intent to kill. The court directed the attention of the jury to the point, that in manslaughter, as well as in murder, there was the “common element of intent to kill,” but throughout the instructions the jury were never informed that there was, or could be, manslaughter without any intention to kill. It is this omission of the court to instruct the jury in regard to a grade of homicide well recognized in and by our law, of which the appellant’s counsel complains in argument, in this court. But it seems to us, that the appellant is in no condition to complain in this court of the omission of the circuit court to instruct the jury fully in regard to involuntary manslaughter. No complaint is made by the appellant of the instructions given; but the only complaint is that the court omitted an instruction which, the appellant claims, was applicable to the case made by the evidence and ought to have been given. This may be conceded; but before the court could be charged with positive error, on account of its omission to instruct the jury in relation

to involuntary manslaughter, it was necessary, we think, that the appellant should have requested of the court such an instruction. If the appellant had requested such an instruction, and if the court had failed or refused to comply with such request, then, but not until then, the appellant could have complained of the omission of the court to instruct the jury in relation to involuntary manslaughter, as probably erroneous. The record fails to show, that the appellant requested of the court any such instruction, and therefore he can not be heard to complain of the court's omission to give such instruction. *Rollins v. The State*, 62 Ind. 46.

It is insisted by the appellant's counsel, with much earnestness and ability; that the evidence adduced upon the trial of this cause was not sufficient to support the verdict of the jury, and that, for this reason, the verdict was contrary to law. From the evidence in the record, and from the facts apparently established thereby, we incline to the opinion, that if the defendant James Patterson had been on trial, the jury might have fairly and reasonably found, that, in the killing of Anthony White, he was guilty only, if guilty at all, of the crime of involuntary manslaughter, as the same is defined in our statute. It would seem from the evidence, that the shot, which caused the death of White, was fired while the pistol was in the hands of James Patterson. Whether the pistol was fired purposely or unintentionally by James Patterson is a grave question in the case, about which there was no direct or positive evidence introduced on the trial; but it is a question, as it seems to us, upon which the absolute guilt, if there was any guilt, and the degree of guilt, of the appellant, William Adams, of the crime for which he was indicted in this case, is entirely dependent.

There was no evidence introduced on the trial, from which it could be fairly and reasonably inferred, that the

Adams v. The State.

appellant was a party to any arrangement or agreement for the killing of Anthony White, or that he was there aiding and abetting, or intending to aid and abet, in any such enterprise. Of course, all the presumptions in the case were in favor of the appellant, until they were removed or overcome by positive evidence. The evidence shows, and, as we read it, it shows nothing more than this, that the appellant was called upon by his companion and codefendant, James Patterson, to assist him and their associates in taking from Anthony White a pistol exhibited by him, and with which he threatened to shoot any one who interfered with him. The taking of this pistol from White was the only enterprise in which the appellant was asked to assist, and, so far as the evidence shows, it was the only enterprise in which he attempted to participate. This enterprise, the taking of the pistol from White, may or may not have been, under the surrounding circumstances, an unlawful act. If it be conceded, however, that the taking of the pistol from White was an unlawful act, it is certain, we think, that this act in and of itself, separate and apart from the fatal consequences of the act, was nothing more than a misdemeanor. It was not a felonious taking, because it does not appear that there was any intention, on the part of any of the participants in the taking, of depriving White of his property in the pistol.

It would seem from the evidence in this case, that, if any one was guilty of the death of Anthony White, it was the defendant James Patterson; and as to him we think the evidence fails to show, that, in the killing of White, he was guilty, beyond a reasonable doubt, of any higher grade of homicide than manslaughter. Assuming from the evidence, as we may fairly assume, that James Patterson, in the homicide of White, was guilty of no higher grade of crime than manslaughter, then the question remains, and, as it affects the appellant, Adams, the important and con-

trolling question in this case, was James Patterson guilty of voluntary or involuntary manslaughter? In the statute of this State defining felonies and prescribing punishment therefor, these two grades of homicide are classed together and defined, in the same section, and to each the same punishment is affixed. But the two grades are widely and essentially different, each from the other, as well we think in the moral turpitude of the crime, as in the constituent facts which determine the grade and character of the offence. Voluntary and involuntary manslaughter, as defined in the statute, "differ from each other in this: That, in the first kind, the unlawful killing is voluntary, that is, the killing is done by design or intention, or purposely; but, in the second kind, the unlawful killing is involuntary, that is, without any design, intention, or purpose of killing, but in the commission of some unlawful act." *Bruner v. The State*, 58 Ind. 159. These two kinds of manslaughter are so widely different from each other, that, in the case just cited, we held, and we think correctly so, that, where a party was charged in an indictment with the commission of voluntary manslaughter, he could not be rightfully convicted, if the evidence showed that he was guilty, if guilty at all, of involuntary manslaughter.

If, now, it be conceded in the case at bar, that the taking of the pistol from Anthony White was an unlawful act, and if, while engaged in this unlawful act, in the struggle for the pistol, and when it was in the hands of the defendant James Patterson, it was accidentally discharged, and the shot thus fired, without any design, intention or purpose of killing, caused the death of White, it is very clear, we think, that the defendant James Patterson, in such killing of White, would be guilty only of involuntary manslaughter, as the same is defined in the statute of this State. If, as we have seen, the appellant,

Adams v. The State.

Adams, was called upon by James Patterson, to participate, and did participate, in the commission of the unlawful act of taking the pistol from White, which act we regard as merely a misdemeanor, can it be correctly said, that the appellant, as the aider and abettor of Patterson in the commission of such misdemeanor, became and was his aider and abettor in the involuntary manslaughter which resulted from such misdemeanor? Can there be an aider and abettor in a case of involuntary manslaughter? It seems clear to us, that these questions must be answered in the negative. An aider and abettor is one who assists another in the accomplishment of a common design or purpose; he must be aware of, and consent to, such design or purpose. But, as we have seen, in involuntary manslaughter, the killing is done without any design or purpose of killing; and if the perpetrator of the crime had no design or purpose of committing it, it is very certain, we think, that there could be no aider or abettor in such crime.

The case of *Regina v. Skeet*, 4 F. & F. 931, decided in 1866, is very much in point, and fully sustains the conclusions we have reached in the case now before us. In the case cited, Skeet and several others were indicted for the murder of one Hayton. The facts of the case were, that, on the night of the homicide, the prisoners were all out trespassing, going through a wood in the direction of a game cover, Skeet being the only man who had a gun. The deceased, one of the game-keepers, having heard a shot, went out alone, armed only with a stick, in the direction of the sound. Soon after the deceased went towards the prisoners, a cry was heard and then a shot, and, when the other keepers came up to him, he was found lying dead, shot through the heart. The prisoners being arrested made statements; the statement of Skeet being, that "The keeper seized the gun, and being cocked and

Adams v. The State.

loaded, it went off by being snatched at." The other prisoners merely stated that they heard the shot, except that one of them stated that Skeet fired the shot.

Skeet was found guilty of manslaughter. POLLOCK, C. B., said: "As regards the other prisoners—there is no evidence against them; and it is admitted that they can not be liable except upon the doctrine of constructive homicide, which, as I have already laid down, does not apply where the only evidence is that the parties were engaged in an unlawful purpose: not being felonious. It only applies in cases where the common purpose is felonious, as in cases of burglary where all the parties are aware that deadly weapons are taken with a view to inflict death or commit felonious violence, if resistance is offered. * * * * Therefore, as there is no evidence against the other prisoners of complicity in any such design, or in the act of firing, they must all be acquitted both of murder and manslaughter."

In a note to the case cited, it is said: "It is the common design or intention to kill in the prosecution of the unlawful object, whether it be misdemeanor or felony, which involves the others in the guilt of homicide. For, even if the common purpose is felonious, if only the actual perpetrator of the act had the intention to kill in the prosecution of the purpose, the others, who did not concur in the act, are not guilty of the act of homicide, as where a robber or burglar puts a pistol in his pocket unknown to his fellows."

In the case of *Regina v. Cruse*, 8 Car. & P. 881, where Cruse was indicted for an assault and battery, with intent to murder, and his wife was charged with aiding and abetting him, it was held to be essential to the conviction of the wife, that she should have been aware of her husband's intention to commit murder.

Our conclusion is, that the evidence in the record is not

Catherwood v. Watson.

sufficient in law to sustain the verdict of the jury against the appellant, William Adams, or to authorize his conviction of the crime, for which he was indicted. For this reason, we think that the court erred in overruling his motion for a new trial.

The judgment is reversed, and the cause is remanded for a new trial.

The clerk will issue the proper notice for the return of the appellant to the sheriff of Owen county.

CATHERWOOD v. WATSON.

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| 65 | 576 |
| 136 | 101 |
| 65 | 576 |
| 140 | 258 |
| 65 | 576 |
| 147 | 533 |
| 65 | 576 |
| 152 | 254 |

RESULTING TRUST.—*Conveyance to Husband, of Land Purchased by Wife.*—*Replevin Bail.*—*Sheriff's Sale.*—A tract of land was purchased and paid for by a married woman, but, though she intended to take the title in her own name, the deed was made, in her absence, to her husband, who, three years after, became replevin bail upon a judgment in the circuit court of the county in which the land was situated; and, upon the expiration of the stay, execution was issued upon such judgment and levied on such land, which was sold by the sheriff, on such execution, to the execution creditor, neither he nor the clerk of the court having notice of the interest of the wife.

Held, that the resulting trust in favor of the wife falls within section 2 of the act concerning trusts, 1 R. S. 1876, p. 915, and therefore that the rights of the purchaser must prevail.

SAME. *Notice* Vague rumors of the facts constituting such trust, communicated by third persons to the attorney of the execution creditor are not sufficient to charge the latter with notice of the trust.

From the Blackford Circuit Court

W. A. Bonham, J. Cantwell and J. R. Wilson, for appellant.

J. Brownlee and H. Brownlee, for appellee

PERKINS, J. Complaint by appellee, Elmira E. Watson, to quiet title.

Catherwood v. Watson.

It states that Daniel A. Watson, the husband of Elmira E. Watson, purchased a tract of land, described in the complaint, with the money of said Elmira, and took the deed in his own name ; that subsequently said Daniel A. became replevin bail on a judgment in the circuit court of Blackford county, in favor of Joseph Catherwood, the appellant, and said land, above mentioned, was sold on execution to make the money due on said judgment, was purchased, at said sale, by Catherwood, and that he had notice of the equity of the appellee, before the sale.

Demurrer to the complaint overruled, and exception entered.

Answer in general denial. Trial by the court, finding for the appellee, and, over a motion for a new trial, judgment on the finding.

One of the grounds of the motion for a new trial was, that the finding was not supported by the evidence.

The evidence is in the record. It was substantially as follows :

Elmira E. Watson testified : " I am the plaintiff in this suit. The land in controversy was purchased with my money. It was purchased from John D. Lewis for \$900 ; was purchased about three years since. My husband did not furnish any part of the money. I always claimed it ; was not present when the deed was made ; intended to have the deed made to me ; did not know when it was purchased ; did not know of the sheriff's sale to defendant, Catherwood, until about one month since ; there was no understanding as to the party to whom the deed was to be made, but I always wanted it. I do not know where the parties went to have the deed made. I had loaned part of the money to my brother, before the purchase of the land."

John C. Helm testified : " I am a brother of Elmira E. Watson. I paid one \$400 note to Marion Smith. It was

Catherwood v. Watson.

plaintiff's money. Don't know whose money paid for the land. I owed plaintiff about \$700, and, after paying the four hundred on the land, I paid the balance to the husband of Elmira E. Watson. The three hundred dollars paid to the husband was some time after the purchase of the land."

Marion Smith testified: "I got the note of John D. Lewis, which was paid by John Helm to me. It was \$400 and interest. The husband of Elmira E. Watson had no means to purchase land. I live a quarter of a mile from Watson. I don't know of Mrs. Watson's husband having any money; he had a team and some stock."

Joseph Futrell testified: "I recollect about the time the land was sold, and remember the money was coming from Mrs. Watson to purchase it. I paid off the last note of \$200 to one Wesley Smith. I was surety on this note for Mrs. Watson and her husband. I remember the time the sale was made by the sheriff. Bonham and Cantwell were attorneys for Catherwood, and I was present in town the day the sale was made. I told Mr. Cantwell, who said the sheriff was going to sell the land that day, I thought it would be a bad sale and would be set aside. Watson, the husband, had no money that I know of to pay."

John D. Lewis testified: "I sold the land in controversy to Daniel A. Watson, husband of said Elmira E. Watson; the contract was made; at the time I talked with plaintiff, she said she had seven hundred to put into a piece of land. A short time after this, Daniel A. Watson came to my house, and we finished up the trade."

"It is here admitted," says the bill of exceptions, "that the land in question was sold at sheriff's sale, on a judgment in favor of Joseph Catherwood, against Samuel A. Mills, upon which Daniel A. Watson was replevin bail, and certificate of sale by the sheriff to Joseph Catherwood."

Catherwood v. Watson.

The defence then offered the following evidence : " That said Daniel paid all of the two hundred dollars, except one hundred and twenty-six dollars."

Joseph Catherwood testified : " I purchased the land at sheriff's sale ; had no notice whatever of plaintiff's claim."

John Cantwell testified : " I am one of the attorneys for Catherwood. On the day of sheriff's sale, and before the sale, Mr. Futrell told me he thought the sale would be bad ; I urged him to say wherein it would be bad, and he refused to communicate it." And this was all the evidence given in the cause.

It is admitted by appellant's attorney, that Catherwood had credited, or entered satisfied, his judgment.

Conceding, without deciding, that a resulting trust arose, in this case, in favor of Mrs. Watson, let us inquire for a moment into the relative equities of said Watson, and the appellant, Catherwood.

Catherwood, it is clear, purchased without any notice of Mrs. Watson's equity. Was he a purchaser for a valuable consideration ? One who gives value, or changes his position for the worse, in reliance in good faith upon the appearance of things, as to the title to property, or extends the time for the payment of an existing debt, stands in the position of a purchaser or creditor for value. 2 Leading Cases in Equity, part 1, p. 32 ; *Brown v. Budd*, 2 Ind. 442.

In the case at bar, Daniel A. Watson purchased the land, took the deed in his own name, and had held the land as his own for about three years, his wife, who now claims the equitable title, having knowledge of the fact, and taking no steps to have the title conveyed to her, or for giving notice to the public of her interest in the land. In the mean time, Catherwood obtains a judgment against Samuel A. Mills, who then may have had property

Catherwood v. Watson.

out of which the judgment might have been immediately collected. But Watson, the husband of appellee, is brought into court by Mills, to stay execution on said judgment against him for six months. Watson is duly accepted as bail for the stay of execution, whereupon it is stayed. Mills avails himself of the period of stay, to dispose of his property, becomes insolvent, and, when the time of stay has expired, execution issues against Watson, the land, of which he has appeared to be the owner, is purchased by Catherwood, at a sale on said execution, in payment of his said judgment; Mrs. Watson stands by till all this is accomplished, and then comes forward and seeks to take the land, as hers, from Catherwood, and leaves him without payment of or security for his debt, and burthened with a heavy bill of costs. We think, on such a state of facts, Catherwood should be allowed to occupy the position of a *bona fide* purchaser, and Mrs. Watson be regarded as estopped by her fraud in standing by and witnessing the imposition upon him. *Laidla v. Loveless*, 40 Ind. 211; *The State v. Holloway*, 8 Blackf. 45.

In this case the wife does not convey her land by estoppel. The land was her husband's.

We can not discover the superiority of the equity of Mrs. Watson to that of Catherwood; and, where the equities are equal, the law will prevail, and the courts of equity will not interfere between the parties. *Vanarsdall v. The State, ex rel., ante*, p. 176.

But, to be more precise, the extension of the time for payment of an existing debt is a valuable consideration. Authorities to this proposition need not be cited. It has become elementary.

In the case at bar, Catherwood held a demand that was due from Mills; the State, by her statutes, said to Catherwood, in consideration that Mills gives you good security, you must extend the time of payment of your judgment

Catherwood v. Watson.

six months. To procure such extension, Watson comes forward and gives Catherwood a lien upon the land in question. This is a valid lien, upon a valuable consideration. It makes no difference that the consideration for the lien passed, not to Watson, but a stranger. *Miller v. Billingsly*, 41 Ind. 489.

As we have said, no notice is shown. Vague reports and rumors from strangers are not sufficient. *Foust v. Moor-man*, 2 Ind. 17, and cases cited; *Cravens v. Kitts*, 64 Ind. 581, at the present term. The purchase in this case, admitting that the husband, Watson, was a trustee by implication, falls within the 2d section of the "Act concerning trusts and powers." 1 R. S. 1876, p. 915. The section is as follows :

"No such trust, whether implied or created, shall defeat the title of the purchaser for a valuable consideration, and without notice of the trust." *Hampson v. Fall*, 64 Ind. 382.

There was no evidence tending to show that Catherwood, or the court which accepted Watson as replevin bail, had any notice that he was not, at the time, the *bona fide* owner of the land.

It should be here remarked, that the motion for a new trial raised a question, not as to the proof of disputed facts, but as to the law arising upon the undisputed facts of the case. There was no material conflict in the testimony. Concede the evidence to be as the appellee claims it to be, still the court erred in holding that the land in question did not pass by the sheriff's sale. The finding and judgment were contrary to law.

The judgment is reversed, with costs, as of the date of the submission of the cause to this court; cause remanded for further proceedings in accordance with this opinion.

HELPHENSTINE v. THE VINCENNES NATIONAL BANK ET AL.

TIME.—*29th of February in Leap-Year.—Repeal of Statutes.*—Section 57 of the practice act of January, 30th, 1824, R. S. 1824, p. 299, providing "That in every leap-year, the 28th and 29th days of February shall be considered in law as one day," which was re-enacted by section 52 of the practice act of January 29th, 1831, R. S. 1831, p. 409, and again in R. S. 1838, p. 454, was repealed by section 4 of chapter 59, R. S. 1843, p. 1023, and has not since been in force in this State.

SAME.—*Statute of 21 H. III.—Cases Overruled.*—The statute of 21 Henry III. makes no provision as to how the 28th and 29th days of February in a leap-year shall be considered in computing periods of less than a year. *Swift v. Tousey*, 5 Ind. 196, *Craft v. State Bank*, 7 Ind. 219, *Kohler v. Montgomery*, 17 Ind. 220 and *Porter v. Holloway*, 43 Ind. 35, overruled.

SAME.—*Process.—Service of Summons.*—The 29th day of February constitutes a day separate from the day preceding; and therefore service of a summons on the 25th day of such month, in a cause in a term of court commencing on the 6th day of March succeeding, is sufficient.

SAME.—*Judgment on Insufficient Service.—Release of Errors.—Waiver.*—A judgment rendered upon a nine days' service of summons, though reversible, on appeal, for insufficient service, is valid; and such service is cured by a release of errors and waiver of irregularities.

From the Daviess Circuit Court.

W. Armstrong, J. T. Dye and A. C. Harris, for appellant.
F. W. Viehe and R. G. Evans, for appellees.

Howk, J.—In this action, the appellant, as plaintiff, sued the appellees, as defendants, in a complaint of a single paragraph. To this complaint, the appellee, the Vincennes National Bank, separately demurred upon the following grounds of objection:

1. That the complaint did not state facts sufficient to constitute a cause of action;

2. For a defect of parties plaintiffs, in this, that the appellees John J. McLaughlin and Howard A. Trendley ought to have been, but were not, parties plaintiffs.

The appellees McLaughlin and Trendley demurred to appellant's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action.

Helphenstine v. The Vincennes National Bank et al.

These demurrers were severally overruled by the court, and to these decisions the appellees severally excepted.

The appellees jointly answered, in two paragraphs, of which the first was a general denial, and the second paragraph was a special or affirmative defence. To the second paragraph of the answer, the appellant demurred, for the want of sufficient facts therein to constitute a defence to his action, which demurrer was overruled, and to this ruling he excepted. He refused to reply to the second paragraph of the answer, and, for the want of such reply, the court rendered judgment in favor of the appellees and against the appellant, for the costs of this suit, from which judgment this appeal is now here prosecuted.

The appellant has assigned, as error, the decision of the circuit court in overruling his demurrer to the second paragraph of the appellees' answer, and the appellee The Vincennes National Bank has assigned, as a cross error, the overruling of its demurrer to the appellant's complaint.

The object of this action was to have the court set aside, and declare null and void, a certain judgment rendered in and by said court, on the 7th day of March, 1876, in favor of the appellee The Vincennes National Bank, and against the appellant and the appellees McLaughlin and Trendley. In his complaint in this action, the appellant alleged, in substance, that, on the 24th day of February, 1876, the appellee The Vincennes National Bank filed a complaint against the appellant and said McLaughlin and Trendley, in the clerk's office of the said Daviess Circuit Court, demanding judgment therein for \$6,000, on a promissory note executed by the appellant and said McLaughlin and Trendley to said Vincennes National Bank; that, on said last named day, the clerk of said court issued the only summons issued in said cause, to the sheriff of Daviess county, Indiana, commanding him to summon the appellant, and said McLaughlin and Trendley, to answer the

Helphenstine v. The Vincennes National Bank et al.

complaint of said Vincennes National Bank, on the second day of the next term of said court, to be begun and held in said county on the first Monday of March, 1876, being the 6th day of March, 1876; that the said summons was placed in the hands of said sheriff, on the day of its issue, who duly served the same on the 25th day of February, 1876, on the appellant and said McLaughlin and Trendley, and made return of such service on said summons; that, on the second day of the said March term of said court, being the 7th day of March, 1876, on the call of said cause, the Vincennes National Bank, by its attorney, produced and read the said summons and return to the court, and, relying solely upon said summons and return, the court caused the appellant and McLaughlin and Trendley to be called, and, upon their failure to appear or answer, to be defaulted; that, relying solely on said summons, and the said service thereof, as being more than ten days before the first day of said term and the said default entered thereon, the court rendered judgment thereon against the appellant and said McLaughlin and Trendley, in favor of the appellee The Vincennes National Bank, in said cause, for \$5,075; that, in truth and in fact, the said summons, so issued in said cause, was not served on the appellant and said McLaughlin and Trendley, ten days before the first day of the March term, 1876, of said court, but was in fact, as was shown by the return of said summons, served on said parties only nine days before the first day of said term, which summons was the only summons issued or served on said parties, and the only notice given them of the pendency of said cause; that the said default and judgment in said cause, were illegal and void; that said judgment was a cloud and an apparent lien on and against the appellant's property, and that the appellees McLaughlin and Trendley were made parties defendants to this action to answer as to any interest they might have in said judgment, and to protect

Helphenstine v. The Vincennes National Bank *et al.*

any interest or right they might have therein. Wherefore, etc.

This cause has been submitted to this court for decision, upon a written agreement of the parties, signed by their counsel, as follows :

“ We agree, that this cause shall be at once submitted to the Supreme Court, and only two questions shall be presented or argued, viz. :

“ 1st. Is the service sufficient ?

“ 2d. Is the judgment void, so as not to be cured by a release of errors and waiver of all irregularities ? ”

These two questions we will consider and decide, in the same order in which counsel have presented and discussed them.

1. From the allegations of the appellant's complaint, the substance of which we have already given, it will be seen, that the legality and validity of the service of the summons therein mentioned are not called in question. But the question for decision may be thus stated: Under the facts stated in the complaint, had the service of the summons been made ten days before the first day of the term of the court at which the appellant and his codefendants were defaulted, and the judgment against them was rendered ? It is provided in and by section 315 of the practice act, as follows :

“ SEC. 315. Every action shall stand for issue and trial at the first term after it is commenced, when the summons has been served on the defendant ten days, or publication has been made for thirty days before the first day of the term.” 2 R. S. 1876, p. 162.

Therefore, unless the facts stated in the complaint showed that the service of the summons therein mentioned was made ten days before the first day of the March term, 1876, of the circuit court, it is clear, we think, that the default and judgment mentioned in the complaint

Helphenstine v. The Vincennes National Bank et al.

were improvidently and irregularly, at least, entered and rendered. The service of the summons set forth in the complaint was made ten days before the first day of the said March term, if the intervening 29th day of February, 1876, which was the bissextile or leap-year, can be legally counted as one separate and distinct day. If, however, the 28th and 29th days of February, of the leap-year, constitute, under the law of this State, only one day, then it would follow, that only nine legal days intervened between the service of the summons and the first day of the said March term, 1876, of the court below.

In the early legislation of this State, in the first decade after the first organization of our State government, it was provided by section 57 of an "An act regulating the practice in suits at law," approved January 30th, 1824, as follows: "That in every leap-year the twenty-eighth and twenty-ninth days of February shall be considered in law as one day." Rev. Stat. 1824, p. 299.

By section 52 of an act on the same subject and with the same title, approved January 29th, 1831, the same provision was re-enacted by the Legislature of this State, in exactly the same language. Rev. Stat. 1831, p. 409. In the Revised Statutes of 1838, page 454, the same provision, in the same language, was brought forward and became a part of that revision. This provision was not re-enacted, however, in the Revised Statutes of 1843, nor in any subsequent legislation of this State. It is claimed, however, by the appellant's counsel, that the provision above quoted was not repealed in or by the Revised Statutes of 1843, and that, not having been thus repealed, it remained in force until the revision of the statutes in 1852, and was then continued in force by and under section 802 of the practice act, approved June 18th, 1852. 2 R. S. 1876, p. 314. We are clearly of the opinion, however, that the provision above quoted, in relation to the

Helphenstine v. The Vincennes National Bank *et al.*

28th and 29th days of February in every leap-year, was repealed by the express terms of section 4 of chapter 59 of the Revised Statutes of 1843, which section reads as follows:

“SEC. 4. All acts and parts of acts, the subjects whereof are revised and re-enacted in the Revised Statutes, or which are repugnant to the provisions therein contained, together with the provisions of such acts as have not been revised and consolidated in these Revised Statutes, shall be repealed from and after publication as aforesaid, with the exceptions and limitations expressed in this chapter.”

The subject of the several acts in 1824, 1831 and 1838, which contained the provision in relation to the 28th and 29th days of February in every leap-year, as we have seen, was “the practice in suits at law;” and that subject was thoroughly “revised and re-enacted in the Revised Statutes” of 1843. The provision above quoted was not within any of the exceptions and limitations expressed in said chapter, and therefore it followed that the provision in question was absolutely repealed under and by virtue of said section 4, above quoted. We think it is certain, therefore, that, if the 28th and 29th days of February, in every leap-year must be considered in law as one day, it is not now by reason of any statutory provision to that effect in this State.

There are, however, some decisions of this court, to the effect that the 28th and 29th days of February in every leap-year must be accounted as but one day. The first case in this court, in which this question was mooted and commented upon, was the case of *Swift v. Tousey*, 5 Ind. 196. It was not necessary, perhaps, to the decision of that case or to the conclusion arrived at therein, that the court should have determined, or attempted to determine, the question as to whether the 28th and 29th days of February in leap-year must be considered in law as two days, or as

Helphenstine v. The Vincennes National Bank et al.

only one day ; but, in the opinion of the court, the two days were apparently regarded in legal contemplation, as but one day. Upon this point, the opinion of the court was founded upon the English statute of 21 Henry III. It was said by the court : " This ancient statute, being prior to 4 James I., made in aid of the common law, and not inconsistent with our institutions, would seem to be in force in this State." This may be conceded, but it seems to us that the statute in question can have no possible bearing on the proper decision of the question now under consideration. The preamble of this statute shows that it was enacted for certain purposes, and to remove doubts in relation thereto, which are unknown to the law of this State. In the English version of this ancient statute, it reads as follows :

" The King unto his Justices of the Bench, Greeting. Know ye, that where within our Realm of England, it was doubted of the year and day that were wont to be assigned unto sick persons being impleaded, when and from what day in the year going before unto another day of the year following, the year and day in a leap-year ought to be taken and reckoned how long it was :

" II. We therefore, willing that a conformity be observed in this behalf everywhere within our Realm, and to avoid all danger from such as be in plea, have provided, and by the counsel of our faithful subjects have ordained, That, to take away from henceforth all doubt and ambiguity that might arise hereupon, the day increasing in the leap-year shall be accounted for one year, so that because of that day none shall be prejudiced that is impleaded, but it shall be taken and reckoned of the same month wherein it groweth ; and that day, and the day next going before, shall be accounted for one day. And therefore we do command you, that from henceforth you do cause this to be published afore you, and be observed. Witness myself at Westminster," etc.

It will be seen, we think, from this statute, which we have set out in full, that it simply provides that the 28th and 29th days of February, as parts of a year which, at common law, consisted of three hundred and sixty-five days, should be accounted for one day, in computing "the year and day that were wont to be assigned unto sick persons being impleaded." The statute makes no provision as to how the two days should be accounted, in computing a number of days, less than one year, in which they might occur; and therefore it seems to us, that the English statute, conceding it to be in force in this State whenever applicable, is not decisive of the question we are now considering.

By the first rule in section 1 of "An act in relation to the construction of statutes, and the definition of terms," approved June 18th, 1852, it is provided, that "Words and phrases shall be taken in their plain, or ordinary, and usual sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." 2 R. S. 1876, p. 315.

The phrase "ten days," as used in section 315, above quoted, of the practice act, has no peculiar or technical meaning in law. A day, in its legal as well as in its "plain, or ordinary, and usual sense," means a period of time consisting of twenty-four hours, and including the solar day and the night. Co. Lit. 135, a; Bracton (folio) 264.

Each of the 28th and 29th days of February, in the leap-year, is a day of twenty-four hours' duration; and, where these two days occur in any period of days less than one year, we are clearly of the opinion, that, under the law of this State, they ought to be and must be regarded and computed as two days, and not as one day, for any purpose.

The case of *Swift v. Tousey*, *supra*, and the cases which follow it, of *Craft v. The State Bank of Indiana*, 7 Ind. 219, .

Helphenstine v. The Vincennes National Bank *et al.*

Kohler v. Montgomery, 17 Ind. 220, and *Porter v. Holloway*, 43 Ind. 35, in so far as they are in conflict with the conclusion reached in this case, are overruled.

From what we have said, it follows necessarily, that the service of the summons mentioned in the appellant's complaint was made ten days before the first day of the March term, 1876, of the court below, and was sufficient.

2. The second question submitted by counsel to this court may be regarded as already answered. The judgment mentioned in the appellant's complaint was taken and rendered upon a sufficient service of the summons, as we have seen, and therefore was not void. If, however, the judgment had been taken and rendered upon an insufficient service of the summons, that is, as it was claimed, upon a service of nine days, instead of ten days, before the first day of the term, as the statute requires, we are of the opinion, that the rendition of a judgment, on such nine days' service of the summons, under the facts alleged in the appellant's complaint, would have been simply an error, for which the judgment would have been reversed, on an appeal to this court. Freeman Judgments, section 126, and cases cited.

It follows, therefore, that the appellant and his codefendants, McLaughlin and Trendley, might well have released such error, and waived the irregularities, if there were any, in said judgment; and having done so, as alleged, in the second paragraph of the appellees' answer, such error and irregularities, if any such had existed, would have been cured by such release and waiver, and could not have been made available to the appellant, in this action.

We think, therefore, that the court did not err in overruling the appellant's demurrer to the second paragraph of the appellees' answer, setting up said release of error.

The judgment is affirmed, at the appellees' costs.

CAMPBELL v. FRANKEM.

FRAUD.—*Fraudulent Representations of Location of Land Sold.*—Interrogatory to Jury.—In an action by the grantee, against the grantor, of certain real estate, to recover damages for alleged fraudulent representations by the grantor to the grantee, in falsely pointing out to the latter, as the lands to be conveyed, other and more valuable lands, the defendant asked leave to submit an interrogatory to the jury trying the cause, as to whether the plaintiff did not have ample opportunity, after the defendant had furnished him with a description of the lands, to ascertain the true location thereof from the records.

Held, that the plaintiff had a right, in purchasing the lands, to rely on the representations made by the defendant as to the location thereof, and therefore that the interrogatory asked was properly refused.

From the Hendricks Circuit Court.

G. H. Chapman, U. J. Hammond and J. J. Hawes, for appellant.

BIDDLE, J.—This action was commenced in the Marion Superior Court. A change of venue was taken to the Hendricks Circuit Court. The complaint contains seven paragraphs. The first is as follows:

That on February 11th, 1874, the defendant, for the consideration of one thousand dollars, agreed to convey to plaintiff certain real estate described as lot No. 11, and lots Nos. 106 and 107, in a certain addition to Indianapolis, subject to certain incumbrances by a mortgage and accrued taxes, which the plaintiff was to pay, as part of the consideration.

“That, before and at the time of said agreement, said defendant, for the purpose of inducing plaintiff to enter into the same and accept of deeds of said lots, falsely represented to him that said lot No. 11 was on high and dry ground, the defendant at the same time falsely pretending to point out to plaintiff the location thereof, the location so pointed out, which, as the plaintiff afterwards discovered, was not the true location, being upon high and dry ground;

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| 65 | 591 |
| 130 | 291 |
| 65 | 591 |
| 137 | 305 |
| 65 | 591 |
| 154 | 192 |

Campbell v. Frankem.

and also falsely represented to plaintiff that said lots Nos. 106 and 107 were on high and dry ground, and were within two squares distance of a certain depot in said county upon the line of the Indianapolis and Vincennes Railroad, commonly known as the 'Maywood' depot; that, in fact, all of said representations were wholly false, said lot No. 11 not being on high and dry ground, nor in or near to the location as aforesaid represented and pointed out, but in low and wet ground; and said lots 106 and 107 not being on high and dry ground, nor within two squares of said 'Maywood Depot,' but being in low and wet ground, and more than two squares distant from said depot; and plaintiff avers that he could not ascertain the true location of said lots when they were pointed out to him, because the ground was covered with snow, and that it so remained covered with snow until after said deeds for said lots were accepted, so that the stakes by which said lots could be identified were entirely covered with snow, and could not be seen; that, as said defendant well knew, the plaintiff was at the time of said representations ignorant, until after he had accepted of the deeds for said lots, of the true location of any of them, but relied wholly upon the representations of the defendant thereto;" that, so relying on said representations of defendant, the plaintiff, on February 7th, 1874, accepted the deeds of said lots; that, if said lot 11 had been as represented, it would have been worth one thousand dollars, and said lots 106 and 107 worth five hundred dollars each. Wherefore, etc.

The other paragraphs of the complaint are founded upon the same state of facts, and are not different in principle from the first.

Separate demurrers to each paragraph of the complaint, for the alleged want of facts, were overruled, and exceptions reserved.

Answer, general denial.

Trial by jury; verdict as follows:

Campbell v. Frankem.

“ We, the jury, find for the plaintiff, and assess his damage at eight hundred dollars.”

With the general verdict, the jury answered interrogatories, as follows :

“ 1. Did not the defendant tell the plaintiff, in the office of the plaintiff’s attorney, Voss, after the plaintiff and defendant had returned from a visit to the South-East Addition, that he could not locate the lots, and was not the trade agreed upon at that interview? and did not Frankem make the trade with the knowledge that Campbell did not know the location of the lot in the South Addition?

“ Ans. We, the jury, answer the interrogatory as follows :

“ 1st. The defendant said he could not locate the lot exactly, but said that the lot was on the high ground, and was not in the creek. The trade was agreed upon at that interview. The plaintiff made the trade with the knowledge that the defendant could not locate the lot exactly, but defendant said it was not in the creek, but on the high ground.

“ 2. If there was any statement made by the defendant to the plaintiff at the office of the witness, Voss, in regard to the location of the lot in the South Addition, was it not in the nature of a guarantee made with the knowledge of both plaintiff and defendant, that the defendant had no knowledge of the exact location of the lot?

“ Ans. The statement was made by the defendant to the plaintiff, that the lot was in the high ground and not in the creek; and the plaintiff knew that the defendant did not locate the lot exactly, but the defendant stated that it was not in the creek, but on the high ground.

“ 3. What was the difference, if any, between the value of the lots at Maywood conveyed to the plaintiff,

Campbell v. Frankem.

and lots situated one and a half or two squares from the Maywood depot, in February, 1874?

"Ans. The difference in the value of the Maywood lots is two hundred dollars (\$200).

"A. H. RICHARDSON, Foreman."

Upon the return of the verdict by the jury, the appellant moved the court to require the jury to make their answer to the interrogatories, returned with the verdict, more specific. This motion was overruled, and exceptions reserved. The appellant then moved for judgment in his favor on the special interrogatories and answers. This motion was overruled and exceptions reserved. Next the appellant moved for a new trial on causes filed. This motion was overruled and exceptions reserved. Judgment on the verdict. Appeal.

Besides the special interrogatories answered by the jury, the appellant moved the court to submit to the jury certain other interrogatories, in writing, to be answered by the jury in connection with their general verdict, amongst which was the following:

"7. Was not Frankem furnished by Campbell with the numbers of the lots? and did not Frankem have ample opportunity, between the time he was so furnished with the numbers of the lots and the time the deeds were made, to ascertain for himself, by examination of the records and otherwise, the location of the lots?"

The court refused to submit this question to the jury, and the appellant excepted.

It is the right of a party to have the jury find upon facts which fall within the scope of the issues in the case, by answers to special interrogatories. The court may control the form of the interrogatories, and judge of their propriety, but, when properly asked for, it is error to reject them. *Bird v. Lanius*, 7 Ind. 615; *The Michigan Southern and Northern Indiana R. R. Co. v. Bivens*, 13 Ind. 263;

Bosworth v. Barker.

Allen v. Davison, 16 Ind. 416; *Rosser v. Barnes*, 16 Ind. 502; *Noble v. Enos*, 19 Ind. 72; *Manning v. Gasharie*, 27 Ind. 399; *Sage v. Brown*, 34 Ind. 464; *Hopkins v. Stanley*, 43 Ind. 553.

We are of opinion that the court did not err in refusing to submit interrogatory number 7 to the jury. The answer to it, whether in the affirmative or negative, could not have controlled the general verdict. The vendor pointed out the location of the lots to the vendee, on the ground where he represented them to lie; the vendee had a right to rely upon such representations, without further examination of the surveys or records. *Cowger v. Gordon*, 4 Blackf. 110; *Gordon v. Cowger*, 4 Blackf. 231; *Hawk v. Pollard*, 6 Blackf. 108; *Cravens v. Kiser*, 4 Ind. 512; *Cox v. Reynolds*, 7 Ind. 257; *Brooks v. Riding*, 46 Ind. 15; *Langsdale v. Girton*, 51 Ind. 99; *Whitney v. Allaire*, 1 N. Y. 305.

The above authorities also show the sufficiency of the complaint in this case.

The judgment is affirmed, at the costs of the appellant.

BOSWORTH v. BARKER.

INSTRUCTIONS.—*Verbal Addition to Written Charge.*—*Practice.*—It is error to add to the written instructions given by the court to the jury any verbal comment, where the party complaining thereof has properly requested that the instructions be reduced to writing.

From the Randolph Circuit Court.

A. O. Marsh, A. Gillett and L. J. Monks, for appellant.

J. J. Cheney, J. S. Engle and L. W. Study, for appellee.

NIBLACK, J.—The appellant, Richard Bosworth, brought this action against the appellee, Henry Barker, before a justice of the peace.

The cause was afterward appealed to the circuit court, where, upon a trial by a jury, there was a verdict and a judgment for the defendant.

Bosworth v. Barker.

The complaint was in two paragraphs.

The first charged, that the defendant set his dogs upon, and worried and injured, two of the plaintiff's hogs, and that the hogs died from the injuries thus inflicted upon them.

The second charged, substantially, the same wrongful acts against the defendant, except that there was no averment that the hogs died from the injuries complained of.

Upon the trial there was evidence tending to show that the alleged injuries to the hogs were inflicted upon them while driving them out of a wheat field, with the assistance of two dogs; that, after the hogs were so driven out of the field, one of them became sick, sore and disabled, and was found dead next morning.

Both parties at the proper time, requested the court to reduce to writing whatever instructions it might give to the jury.

After the conclusion of the argument, the court read to the jury, amongst others, an instruction, which was in writing, as follows:

"If you believe from the evidence, that the injury done to the hog was sufficient to produce the death of the hog, it is immaterial whether it was caused by a large dog or a small dog, or by an old dog or a young one."

After this instruction was read, the court added orally, by way of explanation: "That is, if you find that the injury was sufficient to produce the death of the hog." To the giving of which said oral addition and explanation the plaintiff at the time objected and excepted.

Under our code it is the undoubted right of a party, if he properly requests it, to have all the instructions given by the court reduced to writing before they are given, and we have a long line of decisions holding that it is error, for which a judgment will be reversed, to charge the jury orally, either in whole or in part, where a proper request has been made to have the charge put in writing be-

Bosworth v. Barker.

fore it is given. *Hardin v. Helton*, 50 Ind. 319; *Gray v. Stivers*, 38 Ind. 197; *Southerland v. Venard*, 34 Ind. 390; *Feriter v. The State*, 33 Ind. 283; *The Toledo and Wabash R. W. Co. v. Daniels*, 21 Ind. 256. There are still other cases, to the same effect.

It is error to charge the jury orally, when the party complaining has requested the charge to be in writing, without reference to the question whether the oral charge gave the law correctly or not. *Hardin v. Helton*, *supra*.

The provision of the statute, 2 R. S. 1876, p. 167, requiring charges to be in writing when requested, is imperative, and hence can not be disregarded. *Hardin v. Helton*, 21 Ind. 256.

But it is insisted, that the violation of the provision of the statute, in giving the oral charge complained of in this case, was, at most, only a technical violation, for which the judgment ought not to be reversed, as the verdict was fully supported by the evidence. We are, however, not authorized to hold that a substantial disregard of an imperative statute is, in any event, only a technical error. If we can overlook the relaxation of the statutory requirement above referred to, in a comparatively unimportant case like this, we might permit a still further relaxation in a more important case, in utter disregard of both the letter and spirit of such statutory requirement. This would be a very unsafe practice to adopt, and would afford a dangerous precedent in judicial proceedings.

While we are unable to discover any other available error in the record, the judgment will have to be reversed, because of the error in making the oral addition and explanation to the charge read by the court, as above set forth.

The judgment is reversed, at the costs of the appellee, and the cause remanded for a new trial.

Bell *et al.* v. Hobaugh.

BELL ET AL. v. HOBAUGH.

MORTGAGE.—*Foreclosure against Widow, Heirs and Administrator.*—*Answer.*

—*Action pending between Widow and Administrator.*—*Injunction.*—In an action by the mortgagee, against the widow, heirs and administrator of the deceased mortgagor, for foreclosure of a mortgage on real estate, and for judgment on promissory notes secured thereby, it is no defence to answer that the widow had not joined in the mortgage, that she had not received the five hundred dollars due her as widow, that the deceased left no personal property, that he had left other real estate, encumbered by a mortgage to another for purchase-money, that the widow had paid off one-third thereof, that the administrator, as such, had sold two-thirds thereof to pay debts, and that an action was pending, by the widow, against the administrator, for the payment of her five hundred dollars out of the proceeds of the sale of such real estate.

SAME.—*Rights of Mortgagee.*—The mortgagee is not bound to proceed against the estate of his deceased mortgagor, before proceeding upon his mortgage.

From the Grant Circuit Court.

G. T. B. Carr and *G. W. Harvey*, for appellants.

A. Steele and *R. T. St. John*, for appellee. .

BIDDLE, J.—Complaint by the appellee, who is the mortgagee, against the appellants, who are the heirs and widow and administrator of the mortgagor, deceased, upon two promissory notes, one not due at the time the suit was commenced, and to foreclose the mortgage. The sufficiency of the complaint was not questioned. The widow and heirs answered jointly as to themselves, but separately from the administrator: 1, by general denial; and 2, as follows:

That the mortgage was given by Napoleon B. Martin, at the time of its date, for money borrowed of the plaintiff; that said Catharine Martin was, at the time of giving the mortgage, and at the time said Napoleon died, the wife of said Napoleon, but did not join in the mortgage; that said Napoleon died, leaving the widow and heirs, as averred in the complaint; that said widow is entitled to one-third of said premises in fee; that the children and heirs of the

Bell et al. v. Hobough.

said Napoleon have no interest in said lands mortgaged, except whatever may be their distributive share, after said Catharine has received her interest of five hundred dollars in the estate; that the deceased left no personal property, but died seized of certain other land not mortgaged to the plaintiff, which is described; that said last mentioned real estate was mortgaged by the decedent and said Catharine to William H. Hix, for the payment of nine hundred dollars of the purchase-money; that William H. Hix sold and assigned the mortgage to Oliver P. Hix; that, at the death of the decedent, there was due, on said mortgage, four hundred and seventy-six dollars, one-third of which said Catharine has paid to said Oliver P. Hix, and has had the mortgage released as to said one-third; that said decedent left debts amounting to ——— dollars; that the administrator petitioned to sell two-thirds of said tract, which petition was granted, and the same sold for one thousand dollars, and that the widow sold her said one-third in the same, which said sale was in all things confirmed; that the said Catharine holds a lien on said one thousand dollars, subject only to the payment of the funeral expenses, and the expenses of administration; that she has commenced an action against the administrator to compel him to pay to her five hundred dollars, the further prosecution of which will cause unnecessary expense; that said defendants ask the court to enjoin the plaintiff in this action from further prosecuting this suit, and that he be required to proceed against the administrator, and that the court may decree to the plaintiff whatever may remain in the hands of said administrator after paying the said Catharine five hundred dollars, and said funeral expenses, and expenses of administration and the balance on said mortgage to said Hix, and other proper relief.

The administrator answered,

1. By a general denial; and,

Bell et al. v. Hobough.

2. Substantially the same facts as those set up in the answer of the other defendants above stated.

Separate demurrers, for the alleged want of facts, were sustained to both of the above second paragraphs.

The defendants then withdrew their paragraphs in general denial, and stood by their pleadings; whereupon the court rendered judgment upon demurrer against the adult defendants, and proceeded to hear evidence and try the case against the minor defendants, and rendered a final decree.

No exception was taken to the decree, and the evidence is not in the record. The only questions before us, therefore, arise upon the second paragraph of answer jointly pleaded by the widow and heirs, and the second paragraph pleaded by the administrator, both of which being substantially the same, there is practically but one question before us.

We can not see any thing in the above paragraphs to which demurrers were sustained, that can bar a mortgagee. He had no concern with a subsequent mortgage to another person on other lands; and a suit between the widow and administrator can not be pleaded either in bar or suspension of an action by a mortgagee; nor do we see how a sale of other lands by an administrator can possibly affect the rights of a prior mortgagee; nor do the facts stated show a valid counter-claim, nor any ground for relief by injunction; nor is the mortgagee bound to proceed against the administrator before he sues upon his mortgage.

The judgment is affirmed, at the costs of the appellants.

Opinion filed at November Term, 1878.

Petition for a rehearing overruled at May Term, 1879.

INDEX.

ABANDONMENT OF TITLE.

See DECEDENTS' ESTATES, 4.

ABANDONMENT OF WIFE.

See PARTITION, 2.

ABORTION.

See CRIMINAL LAW, 16.

ACCESSORY.

See CRIMINAL LAW, 31.

ACCOMPLICE.

See CRIMINAL LAW, 13, 31.

ACKNOWLEDGMENT.

See MORTGAGE, 5.

ACQUITTAL.

See CRIMINAL LAW, 16, 22.

ADMINISTRATOR.

See CONTEMPT, 6, 7; DECEDENTS' ESTATES, 2, 3; HEIRS; MORTGAGE, 7.

ADMISSIONS.

See BASTARDY, 1, 2; EVIDENCE, 3, 6; LIFE INSURANCE, 4.

AFFIDAVIT.

See BASTARDY, 3; PROCEEDINGS SUPPLEMENTARY, 2.

AGENCY.

See PRINCIPAL AND AGENT; REAL ESTATE, ACTION TO RECOVER, 4.

ALIMONY.

See EXEMPTION.

ALTERATION.

See EVIDENCE, 9; PRINCIPAL AND SURETY, 5.

AMENDMENT.

See BASTARDY, 3; CITIES AND TOWNS, 3; INSTRUCTION, 4; RAILROAD, 10;
REPLEVIN; SUPREME COURT, 16.

ANNEXATION OF TERRITORY.

See CITIES AND TOWNS, 10.

APPEAL.

See CITIES AND TOWNS, 2 to 4; CONTEMPT, 5; DECEDENTS' ESTATES, 5 to 8;
SUPREME COURT, 3, 10, 19.

APPEAL BOND.

See DECEDENTS' ESTATES, 6 ; PRINCIPAL AND AGENT, 4, 5.

APPRAISEMENT.

See MORTGAGE, 4 ; VENDOR'S LIEN.

APPRAISERS.

See MORTGAGE, 4.

APPROPRIATION.

See RAILROAD, 2 to 14.

ARBITRATION AND UMPIRAGE.

See REVIEW OF JUDGMENT.

ARREST OF JUDGMENT.

See BASTARDY, 3 ; CRIMINAL LAW, 23, 24 ; SEDUCTION, 5.

ARSON.

See CRIMINAL LAW, 6 to 8.

ASSAULT AND BATTERY WITH INTENT.

See CRIMINAL LAW, 1, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See LIFE INSURANCE, 5 ; PROCEEDINGS SUPPLEMENTARY.

Assignee.—Complaint by.—A complaint by one alleging himself to be an assignee for the benefit of creditors, which does not allege that the deed of assignment has been duly recorded, and does not contain a copy thereof, is insufficient on demurrer. *Foster v. Brown*, 234

ASSIGNMENT OF ERROR.

See NEW TRIAL, 2, 6 ; PRACTICE, 11 ; SUPREME COURT, 5, 12, 15, 19 ; TURNPIKE, 1.

ASSIGNMENT OF WRITTEN INSTRUMENT.

See JUDGMENT, 2 ; LIFE INSURANCE, 6 to 11 ; MORTGAGE, 2, 3 ; PROMISSORY NOTE, 7.

ATTORNEY.

See CONTRACT, 6 ; COVENANT, 1 ; PROCEEDINGS SUPPLEMENTARY ; REAL ESTATE, ACTION TO RECOVER, 4 ; TRUSTS.

ATTORNEY'S FEES.

See PROMISSORY NOTE, 1.

BANKING ASSOCIATION.

See INFORMATION.

BANKRUPTCY.

See CONTRACT, 4, 5 ; PROMISSORY NOTE, 12.

BASTARDY.

1. *Admission of Maintenance Provided for Child.*—The admission of the mother of a bastard child, that provision for the maintenance of her child has been made to her satisfaction, as contemplated by section 17 of the bastardy act, 2 R. S. 1876, p. 660, must be entered of record. *Fisher v. The State, ex rel.*, 51
2. *Sama.*—An admission, in writing, that such provision has been made, which has not been entered of record, though containing a request that it be so entered, is no bar to a subsequent prosecution. *Id.*

3. *Arrest of Judgment.—Venus.—Amendment.*—The omission of the venue from the affidavit instituting a prosecution for bastardy is not ground for arresting the judgment, and is deemed, by the Supreme Court, as having been supplied by amendment in the court below. *Ib.*
4. *Motion to Dismiss.—Exception.*—Error in overruling a motion to dismiss such a prosecution, if not excepted to at the time, is not available in the Supreme Court. *Ib.*
5. *Instruction as to Time Child was Begotten.*—Where, in a prosecution for bastardy, it is a question, from the evidence, as to whether or not another than the defendant was the father of the child, which was "a full grown, nine months child," and as to whether, from the testimony of the relatrix, the defendant had had access to her within the period during which it must have been begotten, it was erroneous to instruct the jury trying the cause, that the day and month on which it was begotten were unimportant, if they found that he was its father.
Cunningham v. The State, ex rel., 377
6. *Access Does Not Import Intercourse.*—It was also improper to instruct the jury, in relation to testimony by the relatrix that the defendant had been in her company at certain times, that such testimony tended to prove, that, at those times, he was having sexual intercourse with her. *Ib.*
7. *Defendant's Knowledge of Relatrix's Pregnancy.*—An instruction, that the fact that the defendant was aware, and communicated to others his knowledge, of the pregnancy of the relatrix soon after the child was begotten, should be considered, was erroneous. *Ib.*
8. *Occupation.—Credibility of Witness.*—An instruction, that, if the defendant was a teacher, that fact added nothing to his credibility, but in fact detracted therefrom, if he had in fact had sexual intercourse with the relatrix, was erroneous. *Ib.*
9. *Instruction Prejudicing Jury.*—A statement, in an instruction, that the child was a bastard, and would become a charge upon the county if no father should be found for it, was improper. *Ib.*
10. *Character of Defendant and Relatrix.*—It was improper for the court to instruct the jury, that they may consider whether the defendant, as a man of character, was likely to influence the relatrix, as a woman of a confiding nature, to consent to the sexual act. *Ib.*

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 11, to 15; NUNC PRO TUNC ENTRY; PRACTICE, 1, 9, 12; SUPREME COURT, 2, 4, 20.

1. *Time of filing.—Leave, of Record, to File.*—A motion for a new trial, filed at the term at which trial was had, was overruled at the next term; but, though no time had been granted for filing a bill of exceptions, the court, at a subsequent term, signed a bill of exceptions, then filed, which stated that time had been given for the filing thereof.
Held, that the bill of exceptions constitutes no part of the record.
Nye v. Lewis, 326

2. *Filed Too Late.—Record.*—A bill of exceptions filed at a term subsequent to the term at which the cause was tried, without leave granted that it might be so filed, forms no part of the record. *Scheible v. Law, 332*
3. *Same.*—A bill of exceptions, setting out certain motions and the rulings thereon, filed without leave of record, subsequent to the term at which such rulings were made, forms no part of the record.
Nichols v. The State, ex rel., 512

BILL OF PARTICULARS.

See SUPREME COURT, 20.

INDEX.

BILLIARDS.

See CRIMINAL LAW, 9, 10.

BOND.

See CONTRACT, 4, 5; DECEDENTS' ESTATES, 6; GUARDIAN AND WARD; JUSTICE OF THE PEACE, 2; PRINCIPAL AND SURETY, 4, 5; TOWNSHIP TRUSTEE.

BRIDGE.

See NEGLIGENCE.

BRIEF.

See SUPREME COURT, 11, 12

BROKER.

See PRINCIPAL AND AGENT.

BURDEN OF PROOF.

See CONTRACT, 2; LIFE INSURANCE, 2; PROMISSORY NOTE, 1, 4.

BURGLARY.

See CRIMINAL LAW, 24, 25.

CARRYING CONCEALED WEAPONS.

See CRIMINAL LAW, 20, 21.

CASES CRITICISED, DISTINGUISHED OR OVERRULED.

- 1 Board of Comm'rs, etc., v Miles, 21 Ind. 438, and Wells v. Shoemaker, 39 Ind. 115, distinguished. *Foresman v. Johnson*, 132
- 2 Bourgette v Hubinger, 30 Ind. 296, and O'Halloran v. Leachey, 39 Ind. 150, distinguished. *City of Crawfordsville v. Barr*, 367
- 3 McCormack v. First National Bank, etc., 53 Ind. 466, distinguished. *Williams v. Nesbit*, 171
- 4 Cincinnati, etc., R. R. Co. v. Wells, 39 Ind. 539, and Detroit, etc., R. R. Co. v. Bearss, 39 Ind. 598, distinguished. *Williams v. Hall*, 129
- 5 Indiana, etc., R. W. Co. v. City of Attica, 56 Ind. 476, distinguished. *Bittinger v. Bell*, 445
- 6 Toledo, etc., R. W. Co. v. Goddard, 25 Ind. 185, criticised. *Ft. W., J. & S. R. R. Co. v. Husselman*, 73
- 7 Swift v. Tousey, 5 Ind. 196, Craft v. State Bank, 7 Ind. 219, Kohler v. Montgomery, 17 Ind. 220, and Porter v. Holloway, 48 Ind. 85, concerning the 29th of February, overruled. *Helphenstine v. Vincennes National Bank*, 562.

CENSUS.

See CITIES AND TOWNS, 7.

CERTIORARI.

See CITIES AND TOWNS, 3; INSTRUCTION, 4.

CHARTER.

See CITIES AND TOWNS, 8.

CHURCH TRUSTEES.

See PROMISSORY NOTE, 2.

CITIES AND TOWNS.

See CRIMINAL LAW, 19.

1. *Town.—Street Improvement.—Notice of Letting.—Sunday.—Time.*—The board of trustees of an incorporated town, in advertising for proposals for certain street improvements, pursuant to the act of April 27th, 1869, 1 R. S. 1876, p. 890, caused a notice to be inserted in a public newspaper published on the 10th day of September, 1875, stating that proposals would be received up till "12 o'clock M. of Saturday, September 19th, 1875," but, the 19th being Sunday, the bids were opened, and the contract awarded, on the 18th, at 7:30 P. M.
Held, that the notice was sufficient to authorize the award.
Case v. Fowler, 29
2. *City.—Precept for Sewer Improvement.*—On appeal by a property owner, to the circuit court, from a precept issued by the common council of a city to collect an assessment against his property for the cost of a sewer improvement, the transcript, certified by the city clerk as required by section 71, 1 R. S. 1876, p. 804, of the act for the incorporation of cities, etc., constitutes the complaint in the circuit court against such property holder.
McGill v. Bruner, 421
3. *Same.—Omission in Transcript.—Certiorari.—Amendment.*—Where, in such case, the transcript omits any material proceeding had before the common council, the proper practice is, not by a motion to make certain, but, upon cause shown, to procure a certiorari upon, or an order against, the city clerk, to supply the omission.
Ib.
4. *Same.—Estimates of City Engineer.*—Where such transcript shows, that, upon the completion of the improvement, a complete and corrected estimate of the cost had been made by the city engineer, and adopted by the common council, in the stead of partial estimates made during the progress of such improvement, the omission of such partial estimates from the transcript does not render it insufficient.
Ib.
5. *Same.—Defence.—Making New Parties.*—Under that proviso of said section 71, declaring, that, on such appeal, "no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council," it is incompetent to either plead or prove that a third party claims title to the ground in which such improvement was constructed.
Ib.
6. *Same.—Remedy.—Injunction.*—The remedy of the property owner, in such case, is by an action, at the proper time, to enjoin or restrain the making of the improvements.
Ib.
7. *Statutes and History of the State.—Population.*—The courts of this State take judicial notice of its statutes, and also of its history, which includes the population of its cities and towns as shown by the last census of the United States.
Stultz v. The State, ex rel., 492
8. *Same.—Town and City of Huntington.*—The courts of this State take judicial notice that, from the 16th day of February, 1848, until the 7th day of March, 1873, Huntington, the county-seat of Huntington county in this State, was an incorporated town under a special charter, and that, after the latter date, such municipality incorporated under the general law of this State, as "The City of Huntington."
Ib.
9. *Quo Warranto.—Information Against Persons Assuming to Act as City Officers.—Remedy.—Injunction.*—An information in the name of the State, on the relation of a prosecuting attorney, against certain persons therein named, as the "pretended officers of" a certain "so-called city," alleged that the defendants were assuming to act as the mayor, common councilmen, marshal, treasurer and clerk of such city; that they, without any warrant, charter or grant, were exercising and claimed the right to exercise, over the inhabitants and property within certain described territory, certain corporate liberties, privileges and franchises, such as are exercised by the officers of a lawfully incorporated city, in levying and collecting city taxes, issuing city bonds, controlling streets,

highways and bridges, regulating the public property and markets, establishing and regulating a fire department and public police, and otherwise acting as such officers; and that such corporate liberties, privileges and franchises had been, and still were, usurped by the defendants and each of them.

Held, on demurrer, the contrary not being alleged, that such city was lawfully incorporated, and that the presumption is that the defendants had been lawfully elected as such officers, and that the information is not authorized by section 749 of the code.

Held, also, that injunction is the proper remedy to prevent such officers from exercising such powers outside the city limits. *Id.*

10. *Same.—Annexation to City.*—The legality of the annexation of territory to a city can not be questioned by such an information. *Id.*

CLERK'S FEES.

See COUNTY CLERK.

COLLATERAL SECURITY.

See JUDGMENT, 2; PROMISSORY NOTE, 7.

COMMISSIONER IN PARTITION.

See VENDOR'S LIEN.

COMMON CARRIER.

See RAILROAD, 15 to 19.

1. *Contract.—Consideration.—Complaint for Failure to Receive and Carry.*—A complaint against a railroad company alleged a breach, by the defendant, of an agreement between the plaintiff and the defendant, whereby the latter agreed to ship certain live-stock which the plaintiff agreed, and attempted, to deliver to the defendant for shipment.

Held, that the agreement was based upon a sufficient consideration.

P., C. & St. L. R. W. Co. v. Hollowell, 188

2. *Same.—Rule for Non-Delivery.—Failure to Receive.*—The rule of law, as to the liability of a common carrier for a failure to deliver goods which have been entrusted to it for transportation and delivery, is not applicable, with the same degree of strictness, for unavoidable delay in receiving and carrying. *Id.*

3. *Same.—Answer.—Strike.*—In an action against a common carrier, for delay in receiving and carrying live-stock which it had agreed to receive and carry, the defendant answered that such delay was caused, not by the negligence of the defendant or its agents, but solely by reason of the fact, that, though the defendant was prepared to receive and carry the goods, an armed multitude of people in rebellion against the laws of the State, which neither the defendant nor the civil authority of the State was able to control, by force and arms drove away the engineers and firemen operating the defendant's engines and cars, and thus prevented the defendant from receiving and carrying the plaintiff's live-stock.

Held, on demurrer, that the answer is sufficient. *Id.*

4. *Same.—Reply.*—A reply, in such case, alleging that the cause of such pretended insurrection was an unjust and oppressive reduction by the defendant of the wages of its employees, which induced them to strike and refuse to work, and to assemble in a peaceable body to demand a restoration of their former rate of wages, but without offering any resistance to the civil authorities, is insufficient. *Id.*

5. *Same.*—A reply alleging that such alleged insurrection was composed solely of employees of the defendant, who, peaceably and without arms or violence, and on account of an unjust and oppressive reduction by the defendant of their wages, refused to continue in the defendant's employ until their former rate of wages was restored, and who

had peaceably assembled in a small body to petition therefor, is insufficient. BIDDLE, J., dissents on this point. *Ib.*

COMMON LAW.

See SEDUCTION, 2.

COMMON SCHOOL FUND.

See MORTGAGE, 3, 4.

COMPROMISE.

See DECEDENTS' ESTATES, 4 ; PRINCIPAL AND AGENT.

CONSTITUTIONAL LAW.

See RAILROAD, 8.

CONTEMPT.

1. *Direct and Constructive Defined.*—A contempt of court is either direct or constructive: Direct, when there is an open insult, in the face of the court, to the person of the judge while presiding, or a resistance of its powers in his presence; constructive, when an act is done, not in the presence of, but at a distance from, the court, in disobedience of an order, or to the process, of the court, tending to embarrass, interrupt, obstruct or prevent the administration of justice. *Ex Parte Wright*, 504
 2. *Same.—Practice in Punishing Direct.—Record.*—An offender may be instantly punished for a direct contempt, by arrest and fine or imprisonment without other proof or examination than the knowledge of the judge, gathered from his senses; but, in rendering judgment and making up the record in such case, the causes of the contempt must be stated. *Ib.*
 3. *Same.—Practice in Punishing Constructive.*—In case of a constructive contempt, a *prima facie* case must be made against the alleged offender, either by an affidavit, by the official return of some officer, or by other legitimate evidence, in a way that can be made part of the record. *Ib.*
 4. *Same.—Rule Nisi.—Writ Attaching.*—In such case a rule *nisi* should be entered against the offender before the writ should issue, unless delay be dangerous to the injured party; but in no case of constructive contempt can either the rule or the writ go, until the facts are put upon record in such manner that they may be demurred to, moved against or controverted. *Ib.*
 5. *Same.—Appeal to Supreme Court.*—An appeal lies to the Supreme Court from a judgment of the circuit court punishing a contempt. *Ib.*
 6. *By Defaulting Administrator.—Statute Construed.*—A contempt by an administrator, under section 161 of the decedents' estates act, 2 R. S. 1876, p. 549, consists of an embezzlement or a concealment, of the goods of the estate, and a refusal to answer upon examination, or to deliver the same, or to secure the persons interested in the estate in the value of the same, with ten per cent. damages thereon. *Ib.*
 7. *Same.—Judgment.—Fine.—Imprisonment.*—Upon a showing by an administrator, and a finding by the court, of the amount with which he was chargeable, the court made an order that he pay the same over or stand in contempt; whereupon he reported to the court that it was physically impossible for him, for want of means, to pay the same, but that he had arranged with the persons interested, and was ready, to convey certain real estate to them to secure the amount due. But the court summarily fined him in a certain sum, and ordered his imprisonment in the county jail for a specified time.
- Held*, that the fine was unauthorized, and that the imprisonment ordered was illegal, and should have been only until the administrator had complied

with the order of the court, or until he was discharged according to law.
Ib.

CONTESTED ELECTION.

1. *Information.—Parties.—Jurisdiction.*—Under sections 749 and 750, 2 R. S. 1876, pp. 298 and 299, the right to an office may be contested by an information filed in the circuit court, in the name of the State, on the relation of the contestor, against the contestee.
The State, ex rel., v. Adams, 393
2. *Ballots.—Names showing through Paper.*—The fact, that the ballots cast for the candidate of a particular political party for a certain office are so printed on the inside, that lawful names and designations printed thereon can be seen through the paper, does not render such ballots illegal.
Ib.

CONTINUANCE.

See NEW TRIAL, 6.

Absent Witness.—Diligence.—A motion for a continuance on account of an absent witness, which affirmatively shows that the applicant has not used due diligence to obtain the attendance of the witness, should be overruled.
Osborn v. Storms, 321

CONTRACT.

See COMMON CARRIER, 1; EXEMPTION; SLEEPING CAR COMPANY, 2; SPECIFIC PERFORMANCE.

1. *Action on Lease, for Rent.—Answer Setting up Previous Verbal Contract.—Fraud.*—In an action by the lessor, against the lessee, on a written lease for a term of years, which stipulated for the payment of specified sums at stated intervals, as rent, the defendant answered admitting that the plaintiff was entitled to the amount demanded, but setting up, and alleging a breach of, a previous verbal contract by the lessor, with the lessee, to make certain improvements on the property, and averring that such contract was part of the consideration of the lease.
Held, on demurrer, that the answer is insufficient.
Held, also, that an averment in the answer, that the lessor obtained such lease by "falsely and fraudulently representing" to the lessee that he had already contracted to have such improvements made, does not sufficiently charge fraud.
Welshbillig v. Dienhart, 94
2. *Same.—Issue.—Evidence.—Burden of Proof.*—Under the issues formed by the complaint and answer in such case and a reply specially denying the making of the verbal contract set up in the answer, the plaintiff was entitled, in the absence of any evidence, to recover the amount sued for, the burden of proof being on the defendant.
Ib.
3. *Agreement to Pay Promissory Note of Another.—Extension of Time.—Mortgage.—Measure of Damages.*—A purchaser of the equity of redemption of certain real estate which had been sold at sheriff's sale on execution to one who also held a mortgage thereon to secure the payment of an unmatured promissory note, executed to him by such purchaser's grantor, entered into a written agreement with the mortgagee, which recited the foregoing facts and stipulated that, in consideration of the payment, therein acknowledged, to the mortgagee, of the redemption money on such sheriff's sale, with interest to date, the mortgagee agreed to extend the time of payment of a specified portion of such note for one year after its maturity, and, if that instalment, with ten per cent. interest to that time on the whole amount of the note, was then paid, the time of payment of the residue should be extended another year; and the said purchaser agreed also, "in consideration of the premises, to pay said note in accordance with the tenor and effect thereof, and at the time in this agreement provided."
Held, in an action on the agreement, that it is valid.

Held, also, that the measure of damages is the amount that could have been recovered in a direct action on the note. *Kester v. Hulman*, 100

4. *Contract for Benefit of Another.—Sale and Conveyance Subject to Specified Encumbrances.—Action by Another Encumbrancer.—Judgment.—Bankruptcy.—Indemnity.*—The assignee of a bankrupt estate having represented to the bankrupt court, in writing, that he had negotiated the sale of the bankrupt's real estate to another, subject to the lien of a certain mortgage and certain taxes thereon, that court made an entry reciting the substance of such writing, and ordering the assignee to "make said sale * upon the terms aforesaid," the purchaser, "by a proper instrument, * covenanting to pay the incumbrances thereon," whereupon the assignee conveyed as ordered, and the purchaser executed a bond assuming, "as a part of the purchase consideration * the payment of all taxes, liens and encumbrances, of any and all descriptions, on and against said lands," etc.

Held, in an action on such bond, against the purchaser, by one holding a personal judgment against the bankrupt, which was a lien upon such land before he became bankrupt, that the plaintiff can not recover.

Young v. Schlosser, 225

5. *Same.—Levy of Execution before Commencement of Bankruptcy Proceedings.—Release of Levy.—Satisfaction of Judgment.*—In an action by a judgment creditor, against the purchaser of real estate formerly belonging to E., one of the judgment debtors, and subject to the lien of the judgment, to enforce an alleged contract by the purchaser to pay such judgment, the court found specially as follows, viz.: that, at a time when D. and E., such debtors, were in fact insolvent, a third person, after service of process on the debtors, and then the plaintiff, on the appearance of the debtors without process, severally recovered judgments against the debtors, having priority of lien upon such real estate in the order named; that such judgments were recovered *bona fide*, and without knowledge by either the creditors or the debtors of the insolvency of the latter; that executions upon such judgments were levied by the sheriff on sufficient other property belonging to the debtors to satisfy both writs; that upon a petition subsequently filed the debtors were adjudged involuntary bankrupts, and the property levied upon was taken possession of and sold by the assignee in bankruptcy, the prior judgment lien satisfied from the proceeds of such sale, and the residue covered into the general fund without satisfying any part of the plaintiff's judgment; that subsequently the assignee sold, and, upon his petition setting out the terms of such sale, the bankrupt court ordered him to convey, to the defendant, the land in controversy, for a certain sum, subject to "all taxes, liens and encumbrances, on and against said land," as part of the purchase consideration, which the defendant, by his bond, "assumed the payment of" and agreed to indemnify the bankrupt estates against; and that there were, at that time, certain taxes and a mortgage for purchase-money due upon the land and having priority over the plaintiff's judgment.

Held, as a conclusion of law, that the levy of plaintiff's execution was valid against the assignee, that the officer holding it should not have delivered possession to the assignee, that the levy operated as a satisfaction of the plaintiff's judgment, that such judgment was not a lien upon the land when it was purchased by the defendant, and that the plaintiff can not recover.

McCabe v. Goodwine, 288

6. *Implied Contract.—Services Rendered by Attorney at Request of Client's Attorney.*—The attorneys of one of the parties to an action, being non-residents of the county wherein the action was pending, and having no authority from their client to employ additional counsel, telegraphed to certain resident attorneys to file a certain pleading in such cause, on

behalf of the client, which they, entering their appearance for the client, did. Certain interrogatories having been filed by the opposite party, directed to such client, the resident attorneys moved to strike them out, and, on the overruling of that motion, forwarded the interrogatories to the non-resident attorneys, who caused them to be answered by the client, and then returned them to the resident attorneys to be filed. When the cause came on for trial, the latter attorneys, without being requested so to do, but with the knowledge of the client, assisted the non-resident attorneys in empanelling the jury, in taking down evidence, and in consultations regarding the defence.

Held, in an action therefor, that the resident attorneys are entitled to recover from the client for their services. *Hogate v. Edwards*, 372

CONVEYANCE.

See DEED; CONTRACT, 4, 5; DECEDENTS' ESTATES, 4; FRAUDULENT CONVEYANCE; MISTAKE; NUISANCE, 2; TRUSTS.

COPY.

See ACKNOWLEDGEMENT; ASSIGNMENT FOR BENEFIT OF CREDITORS; CRIMINAL LAW, 5; MECHANICS' LIENS, 1 to 3.

CORPORATION.

See CRIMINAL LAW, 6, 7; MANUFACTURING COMPANY.

COSTS.

See FEES AND SALARIES, 1, 4 to 8.

COUNTER-CLAIM.

See PROMISSORY NOTE, 8, 6.

COUNTY AUDITOR.

See MORTGAGE, 1 to 4.

COUNTY CLERK.

See FEES AND SALARIES, 4 to 8.

COUNTY COMMISSIONERS.

See MORTGAGE, 1 to 3, 6; RAILROAD, 5 to 14.

COUNTY SUPERINTENDENT.

See TOWNSHIP TRUSTEE, 1.

COUNTY TREASURER.

See FEES AND SALARIES, 2.

COVENANT.

1. *Complaint against Remote Grantor.—Possession.—Covenant Running with Land.—Eviction.*—In an action against a remote grantor, for a breach of the covenants contained in a deed of conveyance, in the statutory form, of certain real estate, the complaint alleged, that, for a certain money consideration, by a deed made part of the complaint by copy, the defendant had attempted to convey to one who, in like manner, had attempted to convey to the plaintiff; that the defendant, when he executed such deed, had no title; that, while the plaintiff was in possession under the deed from his immediate grantor, the holder of the paramount title had instituted an action in the proper court, against this plaintiff, and his immediate grantor and this defendant, resulting in a judgment of eviction, against all such defendants; and that this plaintiff had thereupon, to avoid dispossession by legal process, surrendered to the paramount title by becoming the tenant of the holder thereof, and had since surrendered possession to him.

- Held*, on demurrer, that, under section 12, 1 R. S. 1876, p. 364, such deed contained a covenant of general warranty, running with the land, and, therefore, that the complaint was sufficient without an averment that the defendant was in possession when he executed the deed in question.
- Held*, also, that a surrender of possession to the paramount holder's attorney in such action was a legal eviction. *McClure v. McClure*, 482
2. *Same.*—*Former Recovery, against Immediate Grantor.*—An answer in such action, alleging a former recovery by the plaintiff in an action against his immediate grantor, is insufficient. *Ib.*
 8. *Same.*—*Remedy.—Joint or Several Actions.*—The grantee, in such case, may maintain an action against each grantor separately, on his own covenants, or against both jointly. *Ib.*
 4. *Same.*—*Satisfaction of Judgment.*—If separate judgments be recovered, a satisfaction of one would operate, *pro tanto*, as a satisfaction of the other. *Ib.*
 5. *Same.*—*Measure of Damages.—Title-Bond.*—It appearing by the evidence that the defendant had sold the land to a third person, by a title-bond, for a certain sum, that the latter had sold the land, and assigned his bond, to the defendant's grantee, at an advance, and that, in the defendant's deed, the consideration expressed was the sum so paid by his grantee, the plaintiff was entitled to recover for the latter sum with interest from the date of the deed. *Ib.*

CREDIBILITY OF WITNESS.

See BASTARDY, 8; PAYMENT, 1.

CRIMINAL LAW.

See LIQUOR LAW.

1. *Verdict.—Assault and Battery with Intent to Murder.*—On the trial of A., B., C., D., E. and F., jointly indicted for assault and battery with intent to murder, the jury returned a verdict as follows, viz.: "We, the jury, find the defendants guilty as charged in the indictment, as follows:" A. "be confined in the state-prison eight years;" B. "seven years;" C. "four years;" D. "three years;" E. "two years;" F. "two years; and that each be fined one dollar."
- Held*, that the verdict was sufficiently certain. *Hughes v. The State*, 89
2. *Same.*—*Instruction.—Natural Consequences of Act.*—It was proper for the court to instruct the jury in such case, that, if the means used in committing the assault and battery upon the prosecuting witness were such as "would ordinarily and probably have produced death," they might find the defendants guilty of the alleged intent. *Ib.*
 3. *Evidence.—Name.*—The rule of evidence as to the names of defendants is not the same as it is as to the names of third persons, mentioned in an indictment. *Ib.*
 4. *Instruction.—New Trial.—Record.*—An instruction alleged to have been erroneously given does not become part of the record on appeal to the Supreme Court, merely by being copied into the motion for a new trial. *Ib.*
 5. *Uttering Forged Endorsement.—Copies.—Evidence.—Variance in Dates.*—On the trial of a defendant charged with having uttered a forged endorsement of a promissory note, upon an indictment containing copies of both the note and endorsement, the State gave in evidence the original note and endorsement, which corresponded with such copies in every material part, except that there was an erasure in the figures indicating the date of the note, the figures first made being the same as those appearing in the indictment and the amended figures fixing the date a day earlier.

Held, that there was a fatal variance, and that the evidence was incompetent.

Held, also, that a copy or description of the note was essential to the sufficiency of the indictment. *Rooker v. The State*, 86

6. *Indictment for Arson.—Burning Insured Property.—Corporate Existence and Name.*—An indictment for arson, charging the burning of property insured against loss by fire by an insurance company designated by a name apparently indicating it to be a corporation, need not affirmatively aver its corporate existence, nor whether it is a domestic or foreign corporation. *Johnson v. The State*, 204

7. *Same.—Evidence.—Foreign Insurance Company.—Non-Compliance with Statute.*—An insurance policy issued by such company, on such property, is admissible in evidence, on the trial in such case, without proof either of the corporate existence of the company, or that the company, which was a foreign corporation, had complied with the requirements of the act of December 21st, 1865, 1 R. S. 1876, p. 594, "regulating foreign insurance companies doing business in this State," etc. *Ib.*

8. *Same.—Purchase, after Fire, of Part of Insured Property, from Wife of Co-Defendant.*—A witness in such case having testified that he and one indicted jointly with the defendant, at the solicitation of the latter, and on his promise to them that the codefendant could have all of the goods insured which he could carry away, had set the insured property on fire, it was proper to permit evidence of witnesses, that, after the fire, they had purchased, of the wife and at the house of the codefendant, goods of the character of those insured. *Ib.*

9. *Suffering Minor to Play Billiards.—Indictment.*—An indictment charged that, on, etc., at, etc., the defendant, "then and there having the care, management and control of a billiard table, did then and there allow, suffer and permit" G. B. "to play billiards, and a game commonly called 'pool,' upon said table, with persons whose names are unknown to the grand jury, he, the said" G. B., "then and there being a person under the age of twenty-one years; and said table not being then and there kept or used in a private family," etc.

Held, that the indictment is good. *Moore v. The State*, 218

10. *Same.—Evidence.—Name.—Words Describing Offence.*—The words "with persons whose names are unknown," etc., used in the indictment, are descriptive of the offence, and evidence that the game alleged was played by G. B. with "a person whose name is unknown," etc., will not sustain a verdict of guilty. *Ib.*

11. *Bill of Exceptions.—Signing and Filing of.—Record.*—A bill of exceptions containing the evidence, signed by the judge before the making of a motion for a new trial, and filed at the time such motion is made, is part of the record. *Ib.*

12. *Same.—Motion for New Trial.*—A motion for a new trial is part of the record without a bill of exceptions. *Ib.*

13. *Testimony of Accomplice.—Credibility of Witness.*—Though the testimony of a confessed accomplice should be carefully scrutinized by the court and jury trying a defendant, yet the defendant may be convicted on such testimony alone, if it be sufficiently satisfactory to the jury. *Johnson v. The State*, 269

14. *New Trial.—Bill of Exceptions.*—The truth of the grounds alleged in the motion as cause for a new trial must be made to appear by a bill of exceptions. *Ib.*

15. *Same.—Record.—Evidence.*—A writing signed by the judge, and copied into a motion for a new trial, purporting to be a bill of exceptions containing questions put to the defendant, on cross-examination, while testifying as a witness, but containing no caption, and no statement that

the alleged witness really had testified on the trial, forms no part of the record. *Ib.*

16. *Former Acquittal.—Murder of Unborn Child.—Attempt to Produce Miscarriage.*—An acquittal, on an indictment charging the defendant with the murder of an unborn child by the use of means intended to produce a miscarriage by the mother, is no bar to an indictment for an attempt to produce such miscarriage by the use of the same or any other means. *The State v. Elder*, 282

17. *Larceny.—Money Paid to Avoid Arrest Threatened by One Personating Officer.*—On the trial of a defendant indicted for the larceny of certain bank-bills, the evidence on behalf of the State established, substantially, that the defendant had falsely represented to the prosecuting witness and another, that he was an officer having a warrant for the arrest of the latter on a charge of passing counterfeit money; and that, to avoid threatened arrest and imprisonment, the prosecuting witness voluntarily, as the surety, and at the request, of the alleged criminal, and on his promise to repay, executed a promissory note and paid the bank-bills in question, to the defendant.

Held, that, though the facts may constitute the crime of obtaining money, etc., on false pretences, the defendant is not guilty of either larceny or robbery. *Perkins v. The State*, 317

18. *Trespass upon Lands.—License.*—A tenant in possession, merely as such, has no implied license to cut down trees growing upon his leasehold; and his "good intention and honest belief" in cutting the trees afford him no defence. *Derixson v. The State*, 386

19. *Obstructing Public Street of Town.—Board of Trustees.—Supervisor.*—On the trial of a prosecution for obstructing a public street of an incorporated town lying within the limits of a certain road district, the defendant proved, over objection by the State, that the acts constituting the obstruction complained of had been committed by him in repairing such street as a public highway of such road district, of which he was supervisor.

Held, that the evidence was erroneous.

Held, also, that, under section 1 of the act of April 27th, 1869, 1 R. S. 1876, p. 890, the board of trustees of such town had exclusive power over its streets, and therefore that the acts of the defendant were unlawful.

Held, also, that such act impliedly repeals section 47 of the act of June 11th, 1852, 1 R. S. 1876, p. 884, so far as they conflict as to the control of the streets and highways of a town. *State v. Mainey*, 404

20. *Carrying Concealed Weapon.*—On the trial of a defendant charged with carrying a concealed deadly weapon, the concealment alleged is a material fact, and, unless proved, a conviction can not be sustained.

Ridenour v. State, 411

21. *Same.—Intention.*—It is immaterial whether or not a pistol charged to have been carried by the defendant concealed was loaded, and as to what his intention was in carrying it. *Ib.*

22. *Verdict.—Acquittal.*—A verdict finding a defendant guilty of a crime charged in one count of an indictment, without any special finding as to other counts thereof, operates as an acquittal on the latter.

Dawson v. State, 442

23. *Arrest of Judgment.*—Where an indictment charges a public offence, a motion in arrest can not be sustained for defects on its face. *Ib.*

24. *Indictment Cured by Verdict.—Burglary with Intent to commit Larceny.*—After verdict, where no motion to quash has been made, an indictment for burglary with intent to commit larceny is not insufficient, on motion in arrest, merely on account of the omission of the word "personal" as descriptive of the "goods and chattels" which the defendant is alleged to have intended to steal. *Ib.*

25. *Same.—Evidence.—Possession of Stolen Goods.*—Where, on the trial of such indictment, the evidence shows the defendant to have been in the immediate locality of the alleged burglary, both before and after its commission, and that he had possession, and sold or otherwise disposed, of goods stolen, in connection with such burglary, the Supreme Court will not disturb a verdict of guilty on account of the absence of evidence that the defendant broke into the building mentioned in the indictment. *Id.*
26. *Rape.—Indictment.—Grammatical Construction.—Idem Sonans.*—An indictment charged, that, on, etc., at, etc., the defendant “*did* then and there unlawfully, in and upon *Dellia* Weaver, a woman, forcibly and feloniously make an assault, and her, the said *Dellia* Weaver, then and there, unlawfully, forcibly and against her will, feloniously ravish and carnally know; contrary,” etc.
- Held*, that the verb *did* is used conjunctively, and pertains to both branches of the sentence, and that the indictment is sufficient.
- Held*, also, that evidence of such assault upon *Della* Weaver will not authorize a conviction. *Vance v. State*, 460
27. *Involuntary Manslaughter.—Murder.*—On the separate trial of a defendant indicted jointly with B. and others for murder, the evidence established substantially, that an altercation had taken place between the deceased and B., during the evening on which the former was killed; that the deceased, having left the parties indicted, got into an altercation with another, displaying a pistol and threatening to shoot any one interfering with him; that subsequently the parties indicted came up to the deceased, who was immediately struck by B.; that, though the deceased denied having a pistol, the defendant and the other parties indicted, at the request of B., undertook to assist him in disarming the deceased; and that, during the scuffle, and immediately upon B.’s exclaiming that he had obtained the pistol, it was discharged, killing the deceased.
- Held*, that B. was guilty, if at all, of involuntary manslaughter only.
- Held*, also, that the defendant was not guilty. *Adams v. The State*, 565
28. *Same.—Instruction.—Failure to Instruct Fully.*—The court, after reciting the statutory definition of manslaughter, instructed the jury trying such cause, “that, in manslaughter and in murder, there is the common element of intent to kill. The distinction is, that in murder malice, either express or implied, is present, while in manslaughter it is absent. * The intention to kill must grow out of hot blood, in order to reduce an unlawful homicide to the grade of manslaughter.”
- Held*, that, in the absence of a request by the defendant, and a refusal by the court, to instruct as to involuntary manslaughter, he can not complain of the instruction. *Id.*
29. *Same.—Voluntary and Involuntary Manslaughter Distinguished.*—In voluntary manslaughter the killing is intentional, while in involuntary manslaughter the killing is unintentional, but in the commission of an unlawful act. *Id.*
30. *Same.*—One indicted for voluntary manslaughter can not be convicted on proof that he is guilty of involuntary manslaughter. *Id.*
31. *Same.—Aider or Abettor.*—There can be no aider or abettor in the commission of involuntary manslaughter. *Id.*

CURATIVE ACT.

See RAILROAD, 8.

CUSTOM.

See FIRE INSURANCE, 2.

DAM.

See NUISANCE.

DATE.

See CRIMINAL LAW, 5; PLEADING, 8; PROMISSORY NOTE, 11.

DEATH.

See VENDOR'S LIEN.

DECEDENTS' ESTATES.

See CONTEMPT, 6, 7; HEIRS; MANUFACTURING COMPANY; MORTGAGE, 7, 8; VENDOR'S LIEN; WITNESS.

1. *Petition by Creditor for Sale of Land to Pay Debts.*—The petition of a creditor of a decedent's estate, under section 78, 2 R. S. 1876, p. 528, for the sale of the decedent's real estate to pay debts, need not aver that the administrator has refused to act in the matter. *Whisnand v. Small*, 120
2. *Same.—Sale to be made by Administrator.*—The sale in such case, if ordered, must be made by the administrator and not by the creditor. *Ib.*
3. *Same.—Administrator may Redeem from Sale on Foreclosure.*—Real estate sold on foreclosure against the heirs of a decedent may be redeemed by the administrator, even though he was not a party to the foreclosure. *Ib.*
4. *Same.—Abandonment of Title by Compromise.—Tax Deed.—Sheriff's Deed.—Answers to Interrogatories.*—On a petition by a creditor of an insolvent decedent's estate, under said section 78, one of the defendants was a creditor who claimed title to the real estate in question under a tax deed, a sheriff's deed on foreclosure of a mortgage executed by the decedent, and also under a decree rendered in an action by him against the administrator, heirs and certain creditors of the decedent, to quiet title based on such sheriff's deed and tax deed, to which action the petitioning creditor was not a party. On the trial of the petition the jury, with their general verdict for the petitioner, found specially that the administrator had paid into the clerk's office the sum necessary to redeem from such sheriff's sale; that, after the year of redemption, the action to quiet title was brought, and, by agreement, the administrator withdrew the redemption money, the plaintiffs therein paid him a certain sum for the other creditors, the tax deed, sheriff's deed and all debts due the plaintiff from the estate were declared satisfied, and the title to the real estate in question was quieted in the plaintiff; and a decree reciting such agreement was entered accordingly.

Held, that the plaintiffs, by such compromise, abandoned their title under such deeds and rested the same on the decree.

Held, also, that such decree did not bind the petitioner.

Held, also, that the answers to interrogatories supported the verdict. *Ib.*

5. *Final Settlement, Pending Appeal to Supreme Court by Adverse Party.—Reopening of.*—The final settlement of a decedent's estate, during the pendency of an appeal to the Supreme Court by a party against whom a judgment has been rendered in favor of the estate, without making provision under sec. 115, 2 R. S. 1876, p. 537, for payment of whatever may finally be determined as due to such party, is in violation of sec. 112, 2 R. S. 1876, p. 535, and is invalid; and, upon a reversal of such judgment, and the rendition of a judgment in favor of such party, such settlement may, under sec. 116, 2 R. S. 1876, p. 537, be set aside on petition by such party within three years after such settlement is made.

Heaton v. Knowlton, 255

6. *Same.—Appeal Bond.—Supersedeas.*—The fact that no appeal bond was filed, and no supersedeas or order staying proceedings was procured during such appeal, is no defence to such petition. *Ib.*
7. *Same.—Answer.—Reinstatement of Appeal Dismissed.—Notice.—An an-*

- swer to such petition, alleging that such appeal had been dismissed for the failure of such party to file a brief, and that, on reinstatement thereof, no notice of the reinstatement had been given to the estate, is insufficient. *Ib.*
8. *Same.*—Notice of the motion for reinstatement is all the notice to which the appellee is entitled. *Ib.*
9. *Same.*—*Jurisdiction of Circuit Court.—Statute Construed.*—Since the taking effect of the act abolishing common pleas courts, the circuit court has original jurisdiction of a petition to reopen a final settlement, and sec. 116, *supra*, should be so construed. *Ib.*
10. *Action by Executor on Promissory Note.—Set-Off.—Rents of Testator's Real Estate.—Tort of Executor.*—In an action by an executor, on a promissory note executed to him, as such, for property belonging to the estate and sold by him to the defendant, the latter answered by way of set-off, seeking to charge the plaintiff, as executor, for rents accruing to the defendant since the executor's appointment, from real estate of which the testator died seized, collected by the executor and used for the benefit of the estate, which was solvent.
Held, on demurrer, that the answer is insufficient.
Held, also, that the executor individually, but not the estate, is liable for such rents. *Hendrix v. Hendrix*, 329
11. *Same.*—*When Executor May Receive Rents.*—An executor, as such, has no right to take possession of his testator's real estate, or to receive the rents thereof, unless authorized so to do by the will, or in the absence of any heir or devisee on the death of the testator. *Ib.*

DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CONVEYANCE.

DEFAULT.

See GUARDIAN AND WARD, 5.

DELIVERY.

See LIFE INSURANCE, 7 to 9.

DEMAND.

See INFORMATION, 2; TOWNSHIP TRUSTEE, 3; TURNPIKE, 1.

DEMURRER.

See PRACTICE, 3, 4, 5, 6, 8, 10, 13; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 21; VENDOR'S LIEN.

DESCENTS.

See PARTITION, 1, 2.

DILIGENCE.

See CONTINUANCE; PROMISSORY NOTE, 9.

DISMISSAL OF ACTION.

See PRINCIPAL AND SURETY, 2.

DISMISSAL OF APPEAL.

See SUPREME COURT, 3, 10, 19.

DIVORCE.

See EXEMPTION.

DOCKET.

See JUSTICE OF THE PEACE, 1.

DOCKET FEE.

See FEES AND SALARIES, 1.

DUPLICITY.

See PRACTICE, 17.

DURESS.

See CRIMINAL LAW, 17.

ELECTIONS.

See CONTESTED ELECTION.

ENROLLED ACT.

See FEES AND SALARIES, 4.

ERASURE.

See PRINCIPAL AND SURETY, 5.

ESTOPPEL.

See JUDGMENT, 1; LIFE INSURANCE, 9; PROCEEDINGS SUPPLEMENTARY.

EVICTION.

See COVENANT, 1.

EVIDENCE.

See CONTRACT, 2; CRIMINAL LAW, 3, 5, 7, 10, 11, 18, 15, 19, 25, 26; FIRE INSURANCE, 2, 3; INSTRUCTION, 5, 6; LIFE INSURANCE, 2, 4; LIQUOR LAW, 2 to 6; NEGLIGENCE; NEW TRIAL, 4, 6; NUNC PRO TUNC ENTRY; PARTITION, 2; PAYMENT; PRACTICE, 5, 10, 14, 16; PROMISSORY NOTE, 12, 13; RAILROAD, 1, 3; REAL ESTATE, ACTION TO RECOVER 2 to 5; SUPREME COURT, 1, 6, 8, 9, 13, 17; TOWNSHIP TRUSTEE, 4; TURNPIKE, 3; WITNESS.

1. *Nunc Pro Tunc Entry*.—A *nunc pro tunc* entry of record, made upon proper notice and evidence, is competent evidence of the facts it recites.

Cogswell v. The State, ex rel., 1

2. *Promissory Note*.—*Non Est Factum*.—On the trial of an action against co-makers, on a promissory note, wherein the execution of the note was denied by one of the defendants under oath, the plaintiff gave the note in evidence "as against the parties who do not deny the execution of the same under oath," followed by evidence of its execution by such defendant.

Held, that the evidence does not authorize a finding against him.

Carter v. Harter, 37

3. *Hearsay*.—*Admission*.—In an action to recover for the value of certain chattels, delivered by the plaintiff to the defendant to be sold on commission, which had been sold by the latter and converted to his own use, a statement made by a third person, to the plaintiff, in the absence of the defendant, that the latter had said to such third person that he would pay a certain price for such chattels, is hearsay and incompetent.

Meyer v. Bell, 88

4. *Action in Separate Counts, upon Promissory Note and a Judgment thereon*.—*Merger*.—Where one paragraph of a complaint counts upon a judgment rendered on a promissory note, and a second paragraph counts upon the note itself, to which latter count former recovery is pleaded, no objection to the admission of the note in evidence under the second paragraph can be founded on the fact that it is merged in the judgment.

Marshall v. Stewart, 243

5. *Will*.—*Action to Set Aside Sheriff's Sale and Vacate Judgment*.—*Heirs*.—In an action by heirs, to have a certain judgment against their ances-

tor and another, and a sheriff's sale of the ancestor's lands on an execution thereon, set aside, the plaintiffs gave in evidence a will devising the real estate in question to the ancestor "when she shall become of lawful age," and providing that "if, however, she should die before she arrives of lawful age of twenty-one years, then, in that case, the above property * shall descend or fall to" the judgment codefendant.

Held, that, without proof that the ancestor attained her majority before her death, the plaintiffs showed no right of action in themselves.

Cox v. Bird 277

6. *Admissions*.—Verbal admissions or statements, consisting of mere repetitions of oral statements previously made, should be received as evidence with great caution; but admissions deliberately made, and well understood, are entitled to consideration, especially when they are adverse to the interest of the party making them. *Pence v. Makepeace*, 345
7. *Same*.—*Testimony of Subscribing Witness*.—The testimony of a subscribing witness, in whose presence a written instrument purports to have been executed, is the best, but not the only, evidence of its execution. *Ib.*
8. *Supreme Court*.—*Objection to Evidence*.—*Leading Question*.—The objection, that a question put to a witness is leading, can not be made for the first time in the Supreme Court. *Ib.*
9. *Alteration*.—*Question Assuming Fact to be Proved*.—A question put to a witness, as to whether or not he had caused a certain alteration apparent upon the face of a written instrument already in evidence, is not objectionable as assuming a fact yet to be proved. *Ib.*
10. *Question rendered Harmless by Answer*.—An answer by a witness, disclosing his ignorance concerning a matter about which he is questioned, renders the question itself harmless. *Ib.*
11. *Impeachment of Witness*.—*Character*.—The general moral character, but not specific acts, of a witness may be given in evidence to impeach him. *Cunningham v. State, ex rel.*, 377

EXCEPTION.

See BASTARDY, 4; HEIRS; SUPREME COURT, 7.

EXCUSABLE NEGLECT.

See PRINCIPAL AND SURETY, 3.

EXECUTION.

See CONTRACT, 5; EXEMPTION; JUDGMENT, 4; PROCEEDINGS SUPPLEMENTARY; PROMISSORY NOTE, 5, 18; REAL ESTATE, ACTION TO RECOVER; VENDOR'S LIEN.

EXECUTORS AND ADMINISTRATORS.

See CONTEMPT, 6, 7; DECEDENTS' ESTATES, 2, 8, 10, 11; MANUFACTURING COMPANY.

EXEMPTION FROM EXECUTION.

Alimony.—*Contract*.—*Judgment*.—A judgment for alimony is not a debt growing out of, or founded upon a contract, express or implied, and the debtor can not claim exemption of any property from execution on such judgment. *Menzie v. Anderson*, 239

EXHIBIT.

See COPY; VENDOR'S LIEN.

EXPRESS COMPANY.

Action for Failure to Deliver Money.—*Answers to Interrogatories*.—*Judgment Non Obstante*.—In an action against an express company, to recover for money entrusted to it by the plaintiff for delivery to another, and al-

leged to have been lost, the jury, with their general verdict for the plaintiff, found specially, in answer to interrogatories, that the money had been received from the plaintiff, by the agent of the company, for delivery to the consignee, and that the package containing it had been delivered by another agent, with the seals unbroken, to one not the consignee.

Held, the evidence not being in the record, that the answers are not inconsistent with the general verdict. *Monroe v. Adams Ex. Co.*, 60

EXTENSION OF TIME.

See CONTRACT, 3; PRINCIPAL AND SURETY, 1 to 3, 6.

FALSE PRETENCES.

See CRIMINAL LAW, 17.

FEES AND SALARIES.

1. *Docket Fee.—Supreme Court.—Costs.*—The docket fee of four dollars, authorized by section 5, 1 R. S. 1876, p. 776, can only be taxed in the Supreme Court to the losing party.

The L., N. A. & C. R. W. Co. v. Francis, 39

2. *County Treasurer.—Compensation for Collecting Delinquent Taxes.—Statute Construed.*—Construing section 14 of the fee and salary act of March 12th, 1875, 1 R. S. 1876, p. 471, and sections 152 and 155 of the assessment act of December 21st, 1872, 1 R. S. 1876, p. 111, together, a county treasurer is entitled to receive and retain, out of all delinquent taxes collected by him, a commission of five per cent. on amounts voluntarily paid, and six per cent. on amounts paid after levy, regardless of the time in the year when such collections are made.

Foresman v. Johnson, 132

3. *Same.—Cases Distinguished.—The Board of Comm'rs, etc., v. Miles*, 21 Ind. 438, and *Wells v. Shoemaker*, 39 Ind. 115, distinguished. *Ib.*

4. *Act of 1875.—Clerk's Fees.—Enrolled Act.—Mistake.*—The 6th item of the specifications of section 5 of the fee and salary act of March 12th, 1875, reading "For all entries in order books on complete record," etc., as published in the Acts of 1875, Spec. Sess., p. 33, and in 1 R. S. 1876, p. 468, should read "For all entries in order books or complete record," etc., as shown by the enrolled act on file in the office of the Secretary of State. *Sutton v. Parker*, 586

5. *Same.—Fees for Copies, Transcripts, etc.*—Items 4 and 5 of such section relate to the same subject-matter, viz. : Copies, transcripts or exemplifications of any record or paper remaining in the clerk's office. *Ib.*

6. *Same.—Fee for Copy.*—Where any such copy contains less than five hundred words, the clerk is authorized, by item 5, to charge fifty cents; but, if the number of words exceeds five hundred, then, by item 4, he is authorized to charge a fee of ten cents for each hundred words. *Ib.*

7. *Same.—Entries on Order Book or Complete Record.*—Items 6 and 7 of such section relate to the same subject-matter, viz. : Entries in the order book or complete record. *Ib.*

8. *Same.—Fee for Entry on Order Book and Fee Book.*—On a motion to re-tax the clerk's fees in a cause which had been tried in the circuit court, that court found specially that there had been five separate entries made by the clerk in the order book, in said cause, containing an aggregate of less than five hundred words; and that an entry had been made upon the fee book by the clerk, in such cause, containing less than five hundred words.

Held, as a conclusion of law, that, under item 7 of said section 5, the clerk was entitled to tax a fee of fifty cents for each of such entries in the order book.

Held, also, that, for such entry in the fee book, he was entitled to tax a fee of ten cents for each hundred words contained therein. *Ib.*

FINE.

See CONTEMPT, 7.

FIRE INSURANCE.

See CRIMINAL LAW, 6, 7.

1. *Wharf-Boat.—Loss by Ice.—Terms of Policy.*—An insurance company issued a policy to the assured, in a certain sum, "against loss or damage by fire, * on his wharf-boat, tackle and apparel lying at the wharf of the city of Evansville, Indiana, * and to receive, discharge and store freight, hazardous, extra-hazardous and specially hazardous. It is understood that the loss, if any, shall be adjusted according to the conditions herein contained, and those hereto attached." The conditions "attached" were as follows, viz.: "Touching the adventures and perils which the said insurance company is contented to bear and take upon itself in this voyage, they are of the seas, lakes, rivers, canals, fires, jettisons, rovers and assailing thieves."

Held, in an action on the policy, that the company was liable for a loss occurring by means of ice floating against and destroying the boat insured. *Franklin Ins. Co. v. Humphrey*, 549

2. *Same.—Evidence of Custom.—Removal to Ice Harbor.*—Evidence in such action was inadmissible to prove a custom prevailing at Evansville of removing property of the character of that insured from that place to a neighboring ice harbor, for safety during the season of "running ice." *Ib.*
3. *Same.—Notice by, and Assent of, Company, to Remove.*—Evidence was likewise inadmissible in such action, to prove a notice, by the company to the assured, to so remove the property assured, an offer by the company to accept the risk occasioned by the removal, and that such removal would have been safe. *Ib.*
4. *Same.—Fraud.—Negligence.*—The failure of the defendant, even though wilful, to so remove the property insured, constitutes neither fraud nor negligence. *Ib.*

FORECLOSURE.

See DECEDENTS' ESTATES, 3; JUDGMENT, 4; MORTGAGE, 4 to 7; VENDOR'S LIEN.

FOREIGN CORPORATION.

See CRIMINAL LAW, 6, 7.

FORGERY.

See CRIMINAL LAW, 5.

FORMER ACQUITTAL.

See CRIMINAL LAW, 16.

FORMER RECOVERY.

See COVENANT, 2 to 4; EVIDENCE, 4.

FRAUD.

See CONTRACT, 1; FIRE INSURANCE, 4; FRAUDULENT CONVEYANCE; JUSTICE OF THE PEACE, 2, 8; LIFE INSURANCE, 5, 8; PROMISSORY NOTE, 8.

1. *Representation.*—A representation upon which fraud can be predicated must be of an alleged existing fact, and can not be founded upon a mere promise. *Welshbüllig v. Dienhart*, 94
2. *Fraudulent Representations of Location of Land Sold.—Interrogatory to Jury.*—In an action by the grantee, against the grantor, of certain real

estate, to recover damages for alleged fraudulent representations by the grantor to the grantee, in falsely pointing out to the latter, as the lands to be conveyed, other and more valuable lands, the defendant asked leave to submit an interrogatory to the jury trying the cause, as to whether the plaintiff did not have ample opportunity, after the defendant had furnished him with a description of the lands, to ascertain the true location thereof from the records.

Held, that the plaintiff had a right, in purchasing the lands, to rely on the representations made by the defendant as to the location thereof, and therefore that the interrogatory asked was properly refused.

Campbell v. Frankem, 591

FRAUDULENT CONVEYANCE.

Sheriff's Sale of Real Estate Conveyed before Judgment.—Action to Recover.—In an action to recover possession of real estate conveyed by a debtor during the pendency of an action against him for a debt, and afterward levied upon and sold to the plaintiff upon an execution issued upon the judgment recovered in such action, the jury returned a special verdict which was silent as to whether or not the debtor, at the time of making such conveyance, had other property subject to execution.

Held, that the defendant is entitled to judgment on the verdict.

Holman v. Elliott, 78

GRAMMATICAL CONSTRUCTION.

See CRIMINAL LAW, 26.

GUARDIAN AND WARD.

1. *Complaint on Defective Bond.*—Merely formal defects in a guardian's bond may be cured by proper averments in a complaint thereon.

Cogswell v. The State, ex rel., 1

2. *Relator.*—An action may properly be maintained on a guardian's bond, on the relation of his successor. *Ib.*

3. *Bond on Sale of Ward's Realty.—Breaches.*—The failure of a guardian to loan moneys realized by him from the sale of his ward's real estate, the conversion of such money by him, and his failure to pay over and account for the same, are breaches of the bond executed by him to procure the sale. *Ib.*

4. *Guardian's Reports Attacked Collaterally.* The correctness of reports made by a guardian, to the court, of the condition of his trust, may be attacked collaterally, in an action on his bond. *Ib.*

5. *Judgment Against Surety.—Failure to Default Guardian.*—Where, in an action against a guardian and his sureties, on his bond, the sureties fail to object, at the time, to the rendition of judgment against them alone, on the ground that there has been neither an appearance nor answer by the guardian, nor any default taken against him, they can not afterward object on those grounds. *Ib.*

6. *Complaint on Guardian's Bond.—Relators.*—In an action by the State, on the joint relation of A., as guardian, and B., against a defaulting guardian and his sureties, on his bond, the complaint alleged that the defendants had duly executed the bond in suit; that the principal therein had duly qualified as guardian of C. and D., infants, and had received moneys belonging to his wards; that D. had died during such guardianship, leaving B. and C. as the only heirs; that such principal, at the time of such decease, had converted the moneys of D. to his own use, and had been removed from his trust, and thereupon A. had been appointed guardian of C.; and that such guardian had failed to pay over any of D.'s estate to the relators or to any one entitled thereto.

Held, on demurrer, that the complaint, though uncertain, is sufficient.

Held, also, that the guardian was a proper relator.

Potts v. The State, ex rel., 278

INDEX.

HEARSAY.

See EVIDENCE, 8.

HEIRS.

See DECEDENTS' ESTATES, 10, 11; EVIDENCE, 5; MORTGAGE, 7; VENDOR'S LIEN.

Action on Judgment Against Ancestor.—Sheriff's Sale on Decree Against Decedent.—Purchase by Administrator Personally.—Surplus of Purchase-Money.—Judgment without Exception.—Limitations.—Lien.—A judgment debtor having died intestate, leaving no property except a tract of real estate encumbered by a mortgage, and one of the heirs having been appointed administrator, the judgment creditor filed his judgment, which had been rendered more than ten years previous to the death of the debtor, against the estate, but the administrator neither allowed the claim nor took any steps to sell real estate to pay the same. The real estate having been sold and conveyed to the administrator personally, at a sheriff's sale on a decree foreclosing such mortgage, for a sum exceeding the amount necessary to satisfy such decree and costs, the judgment creditor brought an action, and recovered, for the amount of his judgment, against the heirs, who neither objected nor excepted to the form of the judgment.

Held, on motion for a new trial, that the surplus at such sheriff's sale belonged to the estate, and not to the heirs, and, the evidence supporting the finding, that the Supreme Court will not disturb the judgment.

Held, also, that, though such judgment had ceased to be a lien on the real estate, it might be a valid claim against the estate. *Fisher v. Freeman*, 89

HIGHWAY.

See CRIMINAL LAW, 19; NEGLIGENCE.

HISTORY.

See CITIES AND TOWNS, 7.

HUNTINGTON, TOWN AND CITY OF.

See CITIES AND TOWNS, 8.

HUSBAND AND WIFE.

See LIFE INSURANCE, 5 to 11; PARTITION; TRUSTS.

ICE.

See FIRE INSURANCE.

IDEM SONANS.

See CRIMINAL LAW, 26.

IMPEACHING WITNESS.

See BASTARDY, 8; EVIDENCE, 11.

IMPRISONMENT.

See CONTEMPT, 7.

IMPROVEMENTS.

See REAL ESTATE, ACTION TO RECOVER, 1, 3, 4.

INDEMNITY.

See CONTRACT, 4, 5; PROMISSORY NOTE, 7.

INDICTMENT.

See CRIMINAL LAW, 5, 6, 9, 23, 24, 26; LIQUOR LAW, 2.

INFANTICIDE.

See CRIMINAL LAW, 16.

INFORMATION.

See CITIES AND TOWNS, 9, 10 ; CONTESTED ELECTION, 1.

1. *Quo Warranto*.—*Banking Association*.—*Receiver*.—Under sections 749 and 750 of the code, 2 R. S. 1876, pp. 298 and 299, an information in the nature of a *quo warranto* may be filed in the circuit court, in the name of the State, on the relation of a stockholder, against an alleged illegally organized banking association of this State, and its president, cashier and other stockholders, to compel the winding up and settlement of its affairs, the distribution of its assets, and the appointment of a receiver for that purpose.
Albert v. The State, ex rel., 413
2. *Same*.—*Unlawful Organization*.—*Demand*.—Where such information avers, that, for want of a compliance with the requirements of the statute, the association had never been lawfully incorporated, and that the relator had been induced to purchase stock in such association by the representations of its officers and other stockholders, and without knowledge of such illegality, it is not necessary to aver a demand upon the defendants by the relator. *Ib.*
3. *Same*.—*Trusts*.—*Statute of Limitations*.—Where, by the facts alleged in the information, a trust appears to exist in favor of the stockholders, against the officers of the association, who are made defendants, and, in their answer of the statute of limitations, the facts constituting such trust are not denied, such answer is insufficient. *Ib.*

INHABITANT.

See LIQUOR LAW, 6.

INJUNCTION.

See CITIES AND TOWNS, 6, 9 ; MISTAKE ; MORTGAGE, 7 ; RAILROAD, 5 to 14.

INSOLVENCY.

See LIFE INSURANCE, 5 to 9 ; MANUFACTURING COMPANY ; PROMISSORY NOTE, 5, 10.

INSTRUCTION TO JURY.

See BASTARDY, 5 to 9 ; CRIMINAL LAW, 2, 4, 28 ; LIFE INSURANCE, 2, 10, 11 ; LIQUOR LAW, 1 ; PAYMENT ; PRACTICE, 11 ; TURNPIKE, 8.

1. *Failure to Except*.—*Waiver*.—A failure to except to the giving of an instruction, at the time it is given, waives all objection thereto.
Hyatt v. Clements, 12
2. *Instruction on Failure to Answer Interrogatories*.—On failure of a jury to answer some of certain interrogatories the court explained the interrogatories and directed them to be answered fully, "even if it required a re-examination of the whole case, and had the effect to change their general verdict."
Held, that the instruction was proper. *Ib.*
3. *Blank*.—*Failure to Instruct Fully*.—An omission or blank left in an instruction, or an instruction covering part only of the facts, may be cured by asking an additional instruction or the filling of the blank.
Pence v. Makepeace, 345
4. *Same*.—*Certiorari*.—*Amendment*.—Where a material part of an instruction is left blank in the record, a *certiorari* should be procured ; but a blank in an instruction, which does not mislead the jury, is harmless. *Ib.*

5. *Instruction Reciting Evidence*.—An instruction professing to recite the testimony of a witness as it was given is erroneous.
Cunningham v. The State, ex rel., 377
6. *Weight of Evidence*.—An instruction charging the jury as to the weight they should give to certain testimony is erroneous. *Ib.*
7. *Verbal Addition to Written Charge*.—It is error to add to the written instructions given by the court to the jury any verbal comment, where the party complaining thereof has properly requested that the instructions be reduced to writing. *Bosworth v. Barker, 595*

INSURANCE.

See FIRE INSURANCE ; LIFE INSURANCE.

INSURANCE COMPANY.

See CRIMINAL LAW, 6, 7.

INSURRECTION.

See COMMON CARRIER, 3 to 5.

INTEREST.

See TAX TITLE.

INTERPLEADER.

See LIFE INSURANCE, 9.

INTERROGATORY TO JURY.

See DECEDENTS' ESTATES, 4 ; EXPRESS COMPANY ; FRAUD, 2 ; INSTRUCTION, 2 ; LIFE INSURANCE, 8, 7 ; NEW TRIAL, 5 ; NUISANCE, 8, 4 ; PRACTICE, 15 ; RAILROAD, 18, 19 ; SUPREME COURT, 16.

INTOXICATION.

See LIFE INSURANCE, 1 to 4.

JUDGMENT.

- See CONTEMPT, 7 ; CONTRACT, 4, 5 ; COVENANT, 2 to 4 ; EVIDENCE, 4, 5 ; EXEMPTION ; FRAUDULENT CONVEYANCE ; GUARDIAN AND WARD, 5 ; HEIRS ; JUSTICE OF THE PEACE, 2 ; LAW OF THE CASE ; MORTGAGE, 4 ; PRACTICE, 4 ; PROMISSORY NOTE, 13 ; REAL ESTATE, ACTION TO RECOVER, 5 ; REPLEVIN ; SUPREME COURT, 7, 14 ; TIME, 4 ; VENDOR'S LIEN.
1. *Receipt, of Record, Acknowledging Payment*.—*Estoppel*.—*Subsequent Purchaser of Land Subject to Lien*.—*Notice*.—A receipt entered by the judgment plaintiff or his assignee, upon the record of a judgment which is a lien upon real estate, acknowledging payment or satisfaction of the same or any part thereof, does not estop such person from explaining, contradicting or setting aside such receipt, even as against a subsequent purchaser of such real estate without notice. *Lapping v. Duffy, 229*
 2. *Judgment Assigned as Collateral*.—*Effect of Payment of Debt*.—Upon payment, by the debtor, of a debt owing from him to the assignee of a judgment assigned to the latter simply as collateral security, the equitable title to the judgment vests in the assignor of the judgment. *Ib.*
 3. *Entry of Satisfaction*.—*Statutes Construed*.—Neither section 377, p. 188, nor section 5, p. 334, 2 R. S. 1876, authorize satisfaction of a judgment by a simple receipt entered on the record thereof. *Ib.*
 4. *Foreclosure*.—*Execution*.—*Merger of Promissory Note*.—In an action upon a promissory note, and to foreclose a mortgage securing its payment, against the maker and his wife, there was a finding for the amount due on the note, and judgment was rendered on the finding, against the maker personally, "to be levied and collected without any relief," etc. There was also a decree for the foreclosure of the mortgage, and sale

of the mortgaged premises, and for execution over for any residue, but this latter clause was subsequently struck out.

Held, that the note was merged in the judgment.

Held, also, that the judgment was personal, that execution could properly have been issued thereon for any residue unsatisfied after sale of the mortgaged premises, and that a transcript of such proceedings and judgment is competent evidence in an action against such maker alone, on such judgment. *Marshall v. Stewart*, 248

JUDICIAL NOTICE.

See CITIES AND TOWNS, 7, 8.

JUDICIAL OFFICER.

See JUSTICE OF THE PEACE, 2, 3.

JURISDICTION.

See CONTESTED ELECTION, 1 ; DECEDENTS' ESTATES, 9.

JURY.

See NEW TRIAL, 6 ; PRACTICE, 16.

JUSTICE OF THE PEACE.

See PRINCIPAL AND SURETY, 4 ; REPLEVIN.

1. *May Use More Than One Docket*.—A justice of the peace may lawfully keep and use, at one and the same time, more than one "docket," of the description required by section 18, 2 R. S. 1876, p. 608, in which to record the proceedings had and judgments rendered in any or all suits before him. *The State, ex rel., v. Mallory*, 43

2. *Complaint on Bond.—Fraud in Rendering Judgment.—Mistake*.—In an action on the bond of a justice of the peace, the complaint alleged, that, in rendering judgment in a cause pending before him, wherein the relator was a party, the justice, without the knowledge or fault of the relator, and with intent to cheat and defraud him, had fraudulently and purposely rendered the judgment for less than he was entitled to recover. *Held*, on demurrer, that the complaint is insufficient. *Kress v. The State, ex rel.*, 106

3. *Same.—Judicial Officer not Liable for Judicial Act*.—A judicial officer is not liable pecuniarily for injury resulting from his wrongful rendition of judgment, even though however erroneous, false or fraudulent that judgment may be. *Id.*

LANDLORD AND TENANT.

See CONTRACT, 1, 2 ; CRIMINAL LAW, 18 ; PROMISSORY NOTE, 3.

LARCENY.

See CRIMINAL LAW, 17, 24, 25.

LAW OF THE CASE.

The rule of law applied by the Supreme Court in the decision of a case remains the law of that case in all subsequent decisions thereof.

Kress v. The State, ex rel., 106

LEADING QUESTION.

See EVIDENCE, 8.

LEAP YEAR.

See TIME.

LEASE.

See CONTRACT, 1, 2 ; PROMISSORY NOTE, 3 ; RAILROAD, 7.

LESSOR AND LESSEE.

See RAILROAD, 7.

LEVY OF EXECUTION.

See CONTRACT, 5.

LEVY OF TAX.

See RAILROAD, 13.

LICENSE.

See CRIMINAL LAW, 18 ; NUISANCE, 2.

LIEN.

See CONTRACT, 4, 5 ; FRAUDULENT CONVEYANCE ; HEIRS ; JUDGMENT ; MECHANICS' LIENS.

LIFE INSURANCE.

See PROMISSORY NOTE, 8.

1. *Policy.—Application for.—Answer to Question.—Habits of Assured.—Waiver.*—In the application for a policy of insurance upon his life, the applicant, in reply to the double question "What are your habits in respect to the use of intoxicating liquors? have you ever used intoxicating liquors to excess?" answered "temperate," whereupon a policy, was issued to him, containing a clause declaring that it was issued "in consideration of the representations made" in the application, "on the faith of which this policy is written," and also containing a condition, that, "if any of the * answers * made in the application * shall be found in any respect untrue, then this policy shall be * void." An action having been brought upon such policy, the only defence relied upon was that such answer of "temperate" was false.

Held, that the answer referred only to the habits of the applicant, at the time the application was made, and that further answer to such question was waived by the company by issuing the policy.

John Hancock M. L. Ins. Co. v. Daly, 6

2. *Same.—Instruction.—Burden of Proof.*—It was proper to instruct the jury trying such cause, that the only issue before them was whether or not the answer was true when made; that, if true, they should find for the plaintiff, but, if untrue, for the defendant; that evidence of previous intemperate habits could only be considered in determining the truth of the answer when made; and that the burden of proof of the alleged untruth was upon the defendant. *Ib.*
3. *Same.—Answers to Interrogatories.*—Answers to interrogatories put to the jury in such case, finding that the habits of the assured were "temperate," at the time of the application, though previously "intemperate," support a general verdict for the plaintiff. *Ib.*
4. *Same.—Admissions as to Previous Habits.*—Admissions made by the assured, previous to his application that he was then intemperate, were incompetent evidence under the issue in such action. *Ib.*
5. *Policy on Insolvent for his Widow —Parties.—Fraud. Presumption.*—In an action by an assignee for the benefit of the creditors of a deceased debtor, against the widow, to recover the amount of a policy of insurance issued upon his life and made payable to her, the complaint alleged that a policy had been procured, and certain premiums paid, by the debtor, prior to his making assignment, but at a time when he was in fact insolvent; and that, after the assignment, he had surrendered such policy in consideration of a paid-up policy for her benefit and the payment to him of a certain sum of money. Prayer for the recovery of the proceeds of such policy, which were on deposit awaiting the determination of the action.

Held, on demurrer, that the assignee was the proper party to maintain the action.

Held, also, that fraud in obtaining the policies is not presumed, and that the complaint is insufficient. *Foster v. Brown*, 284

6. *Policy on Husband's Life, for Benefit of his Wife, Belongs to Her.—Assignment of.*—An insurance policy, issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery thereof to another, even during the lifetime of the husband, can be made only by her. *Pence v. Makepeace*, 345

7. *Assignment and Delivery.—Interrogatory to Jury.*—Where the title to the proceeds of such an insurance policy is in issue, and an interrogatory is propounded to the jury as to whether or not such policy had been assigned and delivered (without specifying by whom) to a third person, the jury have a right to assume that the interrogatory is as to whether or not such assignment and delivery had been made by the person to whom the proceeds belonged, or by her agent, and they may properly answer accordingly. *Ib.*

8. *Fraud.—Premiums Paid by Insolvent.*—Only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent on a policy of insurance upon his life for the benefit of his wife and children be recovered by his creditors; and in no event can any excess over the amount of the premiums so paid be recovered by them. *Ib.*

9. *Denial of Assignment.—Issue.—Insolvency.—Interpleader.*—A husband, upon whose life an insurance company had issued a policy for the benefit of his wife, having died, the insurance company, by a bill of interpleader, brought the money due on the policy into court, asking the court to determine to whom it belonged, and alleging that both the widow and a third person claimed to be entitled to the same. Whereupon the latter alleged title to the money under an assignment of the policy to him, by the wife and her husband, in writing, in the lifetime of the latter, to secure a debt due from him to such assignee, and that the policy, on which he had paid several premiums, was in his possession, to which she answered by a verified denial of the assignment.

Held, that the only issue between the claimants was as to the making of such assignment, and that the solvency of the husband when he procured the policy and paid the premiums thereon is not, and could not by either of them be put, in issue. *Ib.*

10. *Same.—Assignment and Delivery by Husband.—Possession.—Presumption.*—It was proper, under such issue, to instruct the jury, that such policy, when issued, belonged to the wife absolutely; that "it could not be assigned or transferred * by her husband * without her authority;" that, to prove the assignment claimed, the assignee "must prove, not only that she signed her name to the assignment, but must prove, also, that she either delivered, or authorized the delivery of, the policy;" that "possession of the policy and payment of premiums upon it by" the assignee "could give him no right to it, even though it appeared to be assigned to him, if" the wife "had not signed the assignment or authorized" its delivery to him; and that they could not presume that the wife had authorized her husband to make the assignment. *Ib.*

11. *Same.*—There being no evidence that she had authorized another to sign her name to the assignment, it was not necessary to instruct the jury on that point. *Ib.*

LIQUOR LAW.

See CRIMINAL LAW.

1. *Sale to Minor in Good Faith.—Representations of Minor as to his Age.—Instruction Assuming Fact not Proved.*—On the trial of a defendant indicted for selling intoxicating liquor to a minor, wherein the defence was that the sale alleged had been made by the defendant in good faith,

upon the strength, and in the honest belief of the truth, of representations proved to have been made to the defendant, by the minor and others, at and before the time the sale was made, that such minor was an adult, it was error in the court, in its instructions to the jury, in the absence of evidence to that effect, to charge them that, if such representations were made after the sale charged, they could not be considered by them. *Moore v. The State*, 382

2. *Sale without License.—Indictment.—Evidence.*—An indictment for selling intoxicating liquors without license must allege, though the State need not prove, that the defendant had no license when the sale charged was made. *Stevenson v. The State*, 409
3. *Same.—Barter.—Gift.*—Proof of a barter or gift of intoxicating liquors will not support an indictment charging a sale. *Ib.*
4. *Same.—Sale on Credit.*—Proof of a sale upon credit may be sufficient to support such indictment. *Ib.*
5. *Same.—Sale by Defendant or His Agent.*—A sale by the defendant, or by one authorized by him to make it, to the person named in the indictment, must be proved to justify a conviction. *Ib.*
6. *Act of 1875.—Section 3 Construed.—Inhabitant.—Application, Notice and Evidence of Applicant for License.*—The words "Any male inhabitant," etc., in section 3 of the act of March 17th, 1875, 1 R. S. 1876, p. 869, concerning the sale of intoxicating liquors, mean any male inhabitant of this State, etc.; and neither the application, notice nor evidence on behalf of an applicant for a license under such act need show that he is a resident of the town, township or county where he desires to sell. *Ex Parte Laboyteaux*, 545

LIS PENDENS.

See REAL ESTATE, ACTION TO RECOVER, 7.

MANSLAUGHTER.

See CRIMINAL LAW, 27 to 31.

MANUFACTURING COMPANY.

Liability of Stockholder.—Company's Bill of Exchange.—Endorsement of, by Executor of Deceased Stockholder.—Withdrawal of Stock.—In an action against the estate of a deceased stockholder of an insolvent manufacturing company organized under the act of May 20th, 1852, 1 R. S. 1876, p. 619, on a bill of exchange drawn after the decedent's death, on the company, by its president and accepted by its treasurer, and endorsed by the drawee, and also, without recourse, by a stockholder who was one of the decedent's executors, the complaint set out the foregoing facts and a copy of such bill, and alleged that the decedent's executors continued to hold his stock; that such endorsement was made by such executor with the consent of his co-executor, and on behalf of such estate, pursuant to a resolution, of record, by the corporation, after the decedent's death, "that each stockholder should endorse the company's paper to the amount of his stock," etc.; and that, prior to the decedent's death, there had been a withdrawal of money by the stockholders from the capital stock of the company, at a time when it was largely indebted.

Held, on demurrer, that the complaint is insufficient.

Held, also, that sections 7, 8 and 9 of the act of June 15th, 1852, 1 R. S. 1876, p. 369, "respecting corporations," even were that act applicable to "manufacturing companies," do not render the decedent's estate in this case liable. *Martin v. Fitch*, 216

MARINE INSURANCE.

See FIRE INSURANCE.

INDEX.

629

MARRIAGE.

See SEDUCTION, 4.

MAYOR.

See PRINCIPAL AND SURETY, 4.

MEASURE OF DAMAGES.

See CONTRACT, 3 ; COVENANT, 5.

MECHANICS' LIENS.

1. *Complaint on Account and to Enforce Mechanic's Lien.*—*Copy of Notice Struck Out.*—Where, in an action to recover, and to enforce a mechanic's lien, for the value of building materials alleged to have been furnished by the plaintiff for the defendant, the copy of the notice of the alleged lien is struck out of the complaint on motion, it can not be considered by the court in determining the sufficiency of the complaint thus eliminated. *Rankin v. Walker*, 222
2. *Same.*—If, in such case, the facts alleged in the complaint, after striking out the copy of notice, show an indebtedness due from the defendant to the plaintiff, it is sufficient on demurrer. *Id.*
3. *Material Man.*—*Copy.*—*Notice of Lien.*—*Complaint.*—*Description of Premises.*—*Cases Distinguished.*—*Parties.*—In an action by a material man, against a city as the owner of real estate, to enforce a mechanic's lien for the value of materials furnished for and used in the construction of a building erected on such real estate by a contractor, the notice recited that the plaintiff had furnished the "material for the erection of the city engine building now being erected on part of lot number," etc., giving notice that he intended to hold a lien on said "part of said lot" and the improvements situate thereon," etc., but the complaint contained no more particular description thereof.
Held, on demurrer, that the description in the notice is sufficient, but, for want of averments rendering such description certain, the complaint is insufficient. *Bourgette v. Hubinger*, 30 Ind. 296, and *O'Halloran v. Leachey*, 39 Ind. 150, distinguished.
Held, also, on demurrer for defect of parties defendants, that the contractor, though a proper, was not a necessary, party. *City of Crawfordsville v. Barr*, 367
4. *Extent of Lien.*—A mechanic's or material man's lien attaches to the whole lot or subdivision of land upon which the building is erected, and not merely to the ground covered by it. *Id.*

MERGER.

See EVIDENCE, 4 ; JUDGMENT, 4 ; MORTGAGE, 4.

MISCARRIAGE, ATTEMPT TO PRODUCE.

See CRIMINAL LAW, 16.

MISJOINDER OF ACTIONS.

See SUPREME COURT, 21.

MISJOINDER OF PARTIES.

See PRACTICE, 6.

MISTAKE.

See FEES AND SALARIES, 4 ; JUSTICE OF THE PEACE, 2 ; PROMISSORY NOTE, 4.

Complaint to Reform Deed.—*Subsequent Encumbrancer.*—In an action by the grantee, against the grantor, and an execution creditor and the sheriff, to reform a conveyance of real estate, and to enjoin a threatened sale on

such execution, the complaint alleged, that, "through the mistake, inadvertence and oversight of the grantor and of the draftsman of said deed," a tract of real estate which the grantor did not own, instead of the tract which he did own and which he had sold and intended to convey to the grantee, was described in the deed; that the deed was duly recorded, within fifteen days after its execution and delivery; and that, between the execution and the recording of the deed, a judgment had been rendered in favor of such creditor and against the grantor, in the circuit court of the county wherein the real estate lay, and that it was about to be sold on execution issued on such judgment.

Held, on demurrer by the execution creditor, that, for want of an allegation that such misdescription was the result of a mutual mistake by the grantee, as well as by the grantor and draftsman, the complaint is insufficient. *Schoonover v. Dougherty*, 468

MORTGAGE.

See CONTRACT, 3; PROMISSORY NOTE, 5 to 7; REAL ESTATE.

1. *Parties.—Relator.—County Commissioners.—County Auditor.*—An action may properly be brought in the name of either the proper board of county commissioners, or of the State on the relation of the proper county auditor, for the foreclosure of a mortgage on real estate, executed to the board of commissioners and their successors, for the use of the county, to secure the payment of a promissory note executed to the county treasurer, for the use of the county.

Vanarsdall v. The State, ex rel., 176

2. *Same.—Power of to Execute, Take or Assign.—Ultra Vires.*—The board of commissioners of a county has the right to either execute, receive or assign a promissory note and mortgage necessary to the transaction of its legitimate business. *Id.*
3. *Note and Mortgage Illegally Assigned.—Payment to Assignee.*—A bona fide payment upon such note and mortgage, made to an endorsee by the debtor, without notice that the endorsee's title is invalid, or that such note and mortgage belong to the school fund, is valid against the county. *Id.*

4. *Foreclosure of School Fund Mortgage.—Remedy.—Merger.—Sale by County Auditor.—Appraisement.—Appraisers.*—In an action to recover the possession of real estate, the court found specially, that, on January 26th, 1849, the defendant's grantor executed a school-fund mortgage on the land, which was duly recorded on that day; that, on March 1st, 1859, a judgment for the amount of the debt, and a decree foreclosing such mortgage, were rendered in an action thereon by the State on the relation of the county auditor, against the mortgagor only; that, on September 15th, 1860, such real estate was bid in, at sheriff's sale on such decree, by the county auditor; and that, on March 27th, 1871, the real estate was sold, under such mortgage, by the county auditor, to the plaintiff, without appraisement, for cash.

Held, that under sections 79, 81 and 82 of the act of March 5th, 1865, 1 G. & H. 542, the auditor might either sell the land under the mortgage, or recover judgment on the debt secured by the mortgage, or both; but this would not prevent an action to recover for the debt and to foreclose the mortgage.

Held, also, that the mortgage was merged in such decree of foreclosure.

Held, also, that, after foreclosure, the county auditor could not sell the land under the mortgage.

Held, also, that, under section 97 of the act of March 6th, 1865, 1 R. S. 1876, p. 801, a sale, by a county auditor, of lands so bid in by him, must be on a credit of five years, and for a sum not less than the appraised value thereof.

Held, also, that a sale for cash and without appraisement is invalid.

Held, also, that such appraisal should be made by three disinterested freeholders of the neighborhood.

Held, also, that the defendant was entitled to judgment on the special findings. *Ferris v Cravens*, 262

5. *Complaint.—Copy of Acknowledgment Unnecessary.—Recording Instrument.—Defence.*—In an action by the mortgagee, against the mortgagor and a subsequent purchaser, to foreclose a mortgage on real estate, the complaint alleged that the mortgage had been duly executed and recorded, setting out a copy thereof which did not show any certificate of acknowledgment.

Held, on demurrer, that the acknowledgment is no part of the cause of action, and a copy thereof is not necessary, and that the reasonable inference from the averments of the complaint is that the mortgage had been duly acknowledged.

Held, also, that the want of an acknowledgment should, in such case, be set up affirmatively as a defence. *Sturgeon v. Board of Comm'rs, etc.*, 302

6. *Illegal Loan by County Commissioners.—Ultra Vires.*—In an action by a board of county commissioners, upon a promissory note, and to foreclose a mortgage on real estate given to secure the payment of the note, both executed to the plaintiff, the mortgagor answered, alleging that the consideration for the note was an illegal, unauthorized loan to him, by the plaintiff, of a sum of money belonging to the "court-house fund" of such county.

Held, on demurrer, that the answer is insufficient. *Ib.*

7. *Foreclosure Against Widow, Heirs and Administrator.—Answer.—Action Pending Between Widow and Administrator.—Injunction.*—In an action by the mortgagee, against the widow, heirs and administrator of the deceased mortgagor, for foreclosure of a mortgage on real estate, and for judgment on promissory notes secured thereby, it is no defence to answer that the widow had not joined in the mortgage, that she had not received the five hundred dollars due her as widow, that the deceased left no personal property, that he had left other real estate, encumbered by a mortgage to another for purchase-money, that the widow had paid off one-third thereof, that the administrator, as such, had sold two-thirds thereof to pay debts, and that an action was pending, by the widow, against the administrator, for the payment of her five hundred dollars out of the proceeds of such sale. *Bell v. Hobough*, 598

8. *Same.—Rights of Mortgagee.*—The mortgagee is not bound to proceed against the estate of his deceased mortgagor, before proceeding upon his mortgage. *Ib.*

MURDER.

See CRIMINAL LAW, 1, 2, 16, 27.

NAME.

See CRIMINAL LAW, 3, 6, 7, 10, 26.

NEGLIGENCE.

See FIRE INSURANCE, 4 ; PRINCIPAL AND SURETY, 3 ; PROMISSORY NOTE, 5 ; RAILROAD, 15 to 19.

1. *Wilful Carelessness.—Obstruction of Highway.—Bridge.—Complaint for Damages.*—A complaint for damages alleged that the plaintiff, in travelling along a public highway, without fault or negligence on his part, drove his team upon a "pile of wooden timbers, intended to serve as a bridge, which the defendant had placed in said road at a point where it crossed a "deep and dangerous bayou ;" that such timbers "had been so carelessly placed there by the defendant, that plaintiff's team "fell through and over said timbers," and were killed ; that such accident "was wholly and solely attributable to the negligence, carelessness and wilful

misconduct of the defendant in placing "such timbers at a point in "said road where they could not be avoided by travellers, nor the danger * ascertained before going upon them."

Held, on demurrer, that the complaint is sufficient. *Perry v. Barnett*, 522

2. *Same.—Evidence.—Supervisor.*—Evidence showing that the defendant, as the proper supervisor, had built such bridge in an unskillful manner, and of unfit material, would not sustain a verdict for the plaintiff under such complaint. *Ib.*

NEW TRIAL.

See BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 4, 12, 14; PRACTICE, 11, 12; PRINCIPAL AND SURETY, 3; REPLEVIN; SUPREME COURT, 1, 2, 4, 5, 17.

1. *Motion for, When Made.—Record.—Supreme Court.*—A motion for a new trial must be in writing, and must be filed at the term at which the finding or verdict is rendered. *Cogswell v. The State, ex rel.*, 1
2. *Cause.—Assignment of Error.—Practice.*—Error which is merely cause for a new trial can not properly be assigned as error, in the Supreme Court, on appeal. *Hyatt v. Clements*, 12
3. *May be Granted More than Twice.*—Section 352 of the practice act does not prohibit the granting of another new trial to a party who, once for an erroneous ruling upon a demurrer to a pleading, and again for other reasons, has twice had a new trial of the same cause. *Charles v. Malott*, 184
4. *Motion for.—Admission of Improper Evidence.*—A motion for a new trial, on the ground of the admission of incompetent evidence, should clearly designate the evidence complained of. *Dye v. Davis*, 474
5. *Motion Not Cut Off by Special Finding.*—The making of a special finding of facts by the jury, in answer to interrogatories, does not cut off a motion for a new trial. *Nichols v. The State, ex rel.*, 512
6. *Assignment of Error.—Continuance.—Allowing Jury to take Evidence to their Room.*—Error in refusing a continuance, in refusing to submit an interrogatory to the jury, and in allowing the jury to take items of written evidence with them to their room, are grounds for a new trial, but can not be assigned in the Supreme Court, as errors. *Ib.*

NON EST FACTUM.

See EVIDENCE, 2; LIFE INSURANCE, 9.

NOTICE.

See CITIES AND TOWNS, 1; DECEDENTS' ESTATES, 7, 8; FIRE INSURANCE, 3; JUDGMENT, 1; LIQUOR LAW, 6; MECHANICS' LIENS, 1 to 3; PAYMENT, 3; PRINCIPAL AND SURETY, 4; RAILROAD, 2; SUPREME COURT, 3, 11, 19; TRUSTS; TURNPIKE.

NUISANCE.

1. *Abatement of.—Complaint.—Obstruction of Watercourse by Dam.—Surplusage.*—In an action by one adjoining proprietor against another, for damages and to abate a nuisance, the complaint alleged that a certain watercourse flowed over the lands of the plaintiff, onto and across those of the defendant; that a certain dam across such watercourse, erected on the lands of the defendant by his remote grantor, had been so increased in height, first by the defendant's immediate grantor, and then by the defendant himself, as to back water upon and over the lands of the plaintiff and others; that, in reconstructing the dam, the natural channel had been so narrowed by levees, etc., as to impede the natural flow of the water; and that, in consequence, the lands of the plaintiff had been, and would continue to be, overflowed and rendered unfit for cultivation, and his growing crops damaged. *Held*, on demurrer, that the complaint is sufficient.

Held, also, that a complaint is not rendered insufficient merely because of surplusage contained therein. *Scheible v. Law*, 332

2. *Answer of License from Plaintiff's Grantor.—Reply Interpreting Deed.*—The defendant in such action having answered, setting up a deed to the defendant's immediate grantor, from one who was the plaintiff's immediate, and the defendant's remote, grantor, prior to the grievance complained of, for "the right of way for a mill-race, with ground sufficient for abutments of a dam across such watercourse," the plaintiff replied, setting out the state of facts under which the deed was executed, to assist in its interpretation.

Held, on demurrer to the reply, that the defendant was not authorized by such deed to so construct his dam as to injure the plaintiff's lands, and that the overruling of the demurrer, even if erroneous, was harmless. *Ib.*

3. *Same.—Uncertainty in Interrogatories and Answers.—Record.*—The jury trying such cause, with their general verdict for the plaintiff, answered certain interrogatories, some of which, with the answers thereto, referred to certain diagrams and maps which had been used on the trial, but were not in the record on appeal to the Supreme Court.

Held, that judgment on the answers, notwithstanding the verdict, can not be rendered in such case. *Ib.*

4. *Same.*—It appearing in such case that such watercourse had been so narrowed by the dam as to divide it into two branches, one only of which was crossed by the dam, a special finding that the dam did not extend across the watercourse is not inconsistent with the general verdict. *Ib.*

NUNC PRO TUNC ENTRY.

See EVIDENCE, 1.

1. *Entry of Time to File Bill of Exceptions.—Parol Evidence.*—Parol evidence alone is not sufficient to authorize a *nunc pro tunc* entry, after the expiration of the term, showing that time was granted in term time for the filing of a bill of exceptions. *Schoonover v. Reed*, 831
2. *Same.—Docket Entry.*—To authorize such an entry there must have been a minute on some docket or order book, made at the term, showing that time was duly granted. *Ib.*
3. *Same.—Statement of Judge.—Record.*—A statement by the judge, in a bill of exceptions signed by him and filed after the expiration of the term, that time for the filing thereof had been granted, is not sufficient to authorize such entry, and such bill of exceptions forms no part of the record. *Ib.*

OBSTRUCTING HIGHWAY OR STREET.

See CRIMINAL LAW, 19 ; NEGLIGENCE.

OBSTRUCTING WATERCOURSE.

See NUISANCE.

OFFICER.

See CITIES AND TOWNS, 9.

OPEN AND CLOSE.

See PROMISSORY NOTE, 1.

OPTIONS.

See PRINCIPAL AND AGENT.

PARTIES.

See CITIES AND TOWNS, 5 ; CONTESTED ELECTION, 1 ; LIFE INSURANCE, 5 ; MECHANICS' LIENS, 3 ; MORTGAGE, 1 ; PRACTICE, 6, 8 ; PROCEEDINGS SUPPLEMENTARY ; RAILROAD, 7, 9, 11.

Parties Defendants.—Who are Necessary.—Statute Construed.—Under section 18 of the code, 2 R. S. 1876, p. 89, all parties whose interests, under the issues, are adverse to the interests of the plaintiff, and who, of necessity, must and will be affected by the judgment in the cause, or who are necessary parties to a complete determination or settlement of the questions involved, must be made parties defendants. *Bittinger v. Bell*, 445

PARTITION.

See REVIEW OF JUDGMENT ; VENDOR'S LIEN.

1. *Complaint by Widower of Ancestor's Intestate Daughter.*—A complaint for partition alleged, that a certain intestate had died seized in fee-simple of certain described real estate ; that he left surviving him his widow and four children named, one of the latter being then the wife of the plaintiff ; and that subsequently the plaintiff's wife had died intestate, without issue and without having parted with any of her interest in such real estate, and leaving the plaintiff as her widower.

Held. on demurrer, that, for want of an averment either that the plaintiff's deceased wife's mother did not survive her, or that the value of all her property, real and personal, at the time of her death, did not exceed one thousand dollars, the complaint shows his interest to be but three-fourths of the real estate inherited by her. *Dye v. Davis*, 474

2. *Same.—Abandonment of Wife.—Witness.—Conversation with Wife.*—The widow and other children of such ancestor having answered alleging that the plaintiff had forfeited his interest in his wife's estate, under section 84 of the statute of descents, 1 R. S. 1876, p. 414, by abandoning her, etc., he was not competent to testify, as a witness in his own behalf, to a conversation had between himself and his deceased wife, in her lifetime, tending to show that he had not abandoned her. *Ib.*

PAYMENT.

See JUDGMENT, 1, 2 ; LIFE INSURANCE, 10 ; MORTGAGE, 8 ; PROMISSORY NOTE, 7 ; SUPREME COURT, 10.

1. *Application of.—Promissory Notes Maturing at Different Times.—Statute of Limitations.—Credibility of Witness.—Instruction.*—In an action by the payee, against the maker, on several promissory notes maturing at different times, wherein the defendant alleged and testified that he had paid the note which had first matured to the plaintiff's husband, on her request, the court, in its instructions to the jury as to the application of certain other payments made to the plaintiff, instructed them, that, if they did not believe that such note had been paid, and if no application of such other payments had been made by either party, they should be first applied on that note.

Held. the jury possibly disbelieving such witness, that the instruction was proper. *Hyatt v. Clements*, 12

2. *Same.—Money Paid to Third Person, on Request.*—It appearing from the evidence in such action, that the defendant was surety on a claim against the estate of the payee's deceased husband, of which she was the administratrix, and that he was entrusted by her with the assets and business of such estate, it was proper to instruct the jury, in relation to a payment which the defendant alleged and testified he had made, out of the notes in suit, on her request, upon such claim against the decedent, that it was incumbent upon the defendant to establish, by a preponderance of the evidence, that such request was to make the payment out of money owing to her individually. *Ib.*

3. *Same.—Land Purchased by Maker, on Payee's Request.—Trusts.*—Where, in such case, the defendant sought to obtain a credit on the notes for money alleged to have been paid by him, on the request of the plaintiff, for lands purchased by, and conveyed to, the defendant, for the plaintiff, the court instructed the jury, that, if such purchase was made pursuant

to an agreement that the defendant should take the conveyance in his own name, and pay for the same out of the money he owed the plaintiff, such payment should be credited on the notes as of the date it was made; but that, if the purchase was made without any agreement that payment therefor should be made out of the money owing to the plaintiff, or without her request, knowledge or consent, or an unreasonable time after such request, and without notice to the plaintiff, it should not be allowed as a credit.

Held, that the instruction was proper.

Ib.

PERSONATING OFFICER.

See CRIMINAL LAW, 17.

PETITION FOR A REHEARING.

See SUPREME COURT, 14.

PLEADING.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CITIES AND TOWNS, 2 to 5, 9; COMMON CARRIER, 1, 3 to 5; CONTRACT, 1; COVENANT, 1, 2; DECEDENTS' ESTATES, 10; GUARDIAN AND WARD, 1, 6; INFORMATION; JUSTICE OF THE PEACE, 2; MECHANICS' LIENS, 1 to 3; MISTAKE; MORTGAGE, 5, 7; NEGLIGENCE, 1; NUISANCE, 1, 2; PARTITION, 1; PRACTICE, 1, 3 to 10, 13; PRINCIPAL AND SURETY, 3; PROCEEDINGS SUPPLEMENTARY; PROMISSORY NOTE, 1, 3, 5, 8 to 11; REAL ESTATE, ACTION TO RECOVER, 1, 6; REPLEVIN; REVIEW OF JUDGMENT, SEDUCTION; SUPREME COURT, 16, 18, 20, 21; SURETY OF THE PEACE; TOWNSHIP TRUSTEE, 3; TURNPIKE, 1, 2; VENDOR'S LIEN.

1. *Reformation of Writing*.—An answer seeking to reform an instrument in suit must allege that the reform sought is according to the agreement of both parties at the time the instrument was written.

Welshbillig v. Dienhart, 94

2. *Same*.—*Failure of Consideration*.—*Partial Answer*.—An answer of partial failure of consideration, pleaded to the whole of a complaint, is insufficient.

Ib.

3. *Pleading*.—*Blanks*.—*Dates*.—*Amounts*.—The omission, from a pleading, of material dates and amounts, is a violation of the rules of good pleading.

Williams v. Nesbit, 171

POSSESSION.

See COVENANT, 1; CRIMINAL LAW, 8, 25; LIFE INSURANCE, 10.

PRACTICE.

See BILL OF EXCEPTIONS; CITIES AND TOWNS, 3, 5; CONTEMPT, 2 to 5; EVIDENCE, 8; INSTRUCTION; NEW TRIAL; NUNG PRO TUNC ENTRY; PARTIES; REINSTATING APPEAL; SUPREME COURT.

1. *Motion to Strike Out*.—*Bill of Exceptions*.—A ruling upon a motion to strike out parts of a pleading must be made a part of the record by a bill of exceptions.

Cogswell v. The State, ex rel., 1

2. *Trial without Issue*.—*Waiver*.—A trial by agreement of parties, without issue, is a waiver of an issue.

Ib.

3. *Harmless Error*.—The sustaining of a demurrer to a paragraph of a pleading is harmless, where the facts alleged therein are admissible in evidence under a remaining paragraph.

Welshbillig v. Dienhart, 94

4. *Judgment on Demurrer*.—*Damages to be Assessed on*.—When a defendant elects to stand upon his answer, to which a demurrer has been sustained, the only question for the court is the assessment of the damages.

Pullman Palace Car Co. v. Taylor, 153

5. *Same*.—*Supreme Court*.—*Record*.—*Evidence*.—Where, in such case, evidence has been introduced as to the amount of damages to be assessed,

but is omitted from the record on appeal to the Supreme Court, no question can arise as to the amount of damages assessed. *Ib.*

6. *Misjoinder of Parties.—Demurrer.*—A misjoinder of parties is not a ground of demurrer. *Potts v. The State, ex rel., 273*
7. *Motion to Strike Out.*—Error in overruling a motion to strike out irrelevant or redundant matter in a pleading is not available in the Supreme Court. *Cox v. Bird, 277*
8. *Defect of Parties.—Demurrer.*—An objection to a complaint, on the ground that it appears on its face that there is a defect of parties plaintiffs or defendants, is not presented by a demurrer for insufficiency, but must be presented by demurrer assigning such defect as cause. *Ib.*
9. *Motion to Strike Out.—Record.—Bill of Exceptions.*—A party complaining of a ruling sustaining a motion to strike out a part of a pleading must, if he would present any question thereon to the Supreme Court, not only except thereto at the time, but also make the motion, ruling and part struck out parts of the record by a bill of exceptions. *Berlin v. Oglesbee, 308*
10. *Harmless Ruling on Demurrer.—Action to Recover Real Estate.*—As all matters of defence to an action to recover possession of real estate are admissible in evidence under the general denial, the sustaining of a demurrer to a special paragraph of answer is harmless, if the general denial be also pleaded. *Ib.*
11. *New Trial.—Assignment of Error.—Change of Venue.—Instruction.*—Error in refusing a change of venue, or an instruction asked, is cause for a new trial, and can not be presented to the Supreme Court, by an independent assignment of error. *Ib.*
12. *Same.—Bill of Exceptions.*—The truth of causes alleged as grounds for a new trial must be made to appear to the Supreme Court by a bill of exceptions. *Ib.*
13. *Demurrer Waived by Pleading.*—A demurrer to a complaint is waived by answering without requiring a decision on the demurrer. *Beckner v. Riverside, etc., T. P. Co., 468*
14. *Discretion of Court.—Evidence after Close.*—It is within the discretion of the court, after a party has closed his evidence, to allow him to introduce evidence as to a material fact, omitted before. *Nichols v. The State, ex rel., 512*
15. *Interrogatory.*—It is within the discretion of the court trying a cause to decide whether an interrogatory propounded is relevant, properly framed and presented in time. And, if the ground covered by it has already been covered by another interrogatory, it may be refused. *Ib.*
16. *Jury may not take with them Written Evidence.*—It is settled law in this State, that it is error to allow the jury, over the objections of a party, to take with them to their room, in consulting as to their verdict, items of documentary evidence introduced by the opposite party. *Ib.*
17. *Same.—Duplicity.—Practice.*—Duplicity in a complaint may be reached by a motion. *Ib.*

PRESUMPTION.

See LIFE INSURANCE, 5, 10; REAL ESTATE, ACTION TO RECOVER, 7.

PRINCIPAL AND AGENT.

See CONTRACT, 6; EXPRESS COMPANY; LIFE INSURANCE, 7, 10, 11; LIQUOR LAW, 5; PAYMENT; PRINCIPAL AND SURETY, 4; PROMISSORY NOTE, 1.
Sale, through Agent, for Future Delivery.—Compromise by Agent.—“Options”.—Broker.—Certain grain dealers in this State having authorized certain commission merchants in another State to sell a certain quantity of

grain, on the account of the former, at a specified price, to be delivered at the "option" of the former, to the purchaser, at any time during a specified month, and such sale, and partial delivery pursuant thereto, having been made, the sellers telegraphed to the commission merchants, thirteen days prior to the expiration of the month, to buy grain sufficient "to fill balance of our sale," whereupon the latter, on the next day, compromised the contract by paying to the purchaser the difference between the contract price and the market price of such grain at that time, but before the expiration of the month the market price had fallen.

Held, in an action by the agents against their principals, to recover such compromise payment as money paid for the use of the principals, that they can not recover. *Godman v. Meizsel*, 82

PRINCIPAL AND SURETY.

See GUARDIAN AND WARD, 5; SUPREME COURT, 19; TOWNSHIP TRUSTEE 4;

1. *Extension of Time Indefinitely*.—An agreement for an extension, for an indefinite period, of the time of payment of a promissory note, made between the holder and principal without the knowledge or consent of the surety, will not discharge the latter, though founded upon a valuable consideration. *Tracy v. Quillen*, 249
2. *Same*.—*Dismissal of Action*.—An agreement between the holder and principal, that the former will dismiss an action pending on the note against both principal and surety, and make a credit on the note, will not discharge the surety, though made without his knowledge and consent and for a valuable consideration. *Ib.*
3. *Same*.—*Complaint for New Trial*.—*Surprise*.—*Excusable Neglect*.—A complaint by the surety for a new trial, upon the ground, that, because of "surprise" and "excusable neglect" on the former trial, he had failed to plead and prove an alleged agreement between the plaintiff and the principal, for an extension of the time of payment indefinitely, is insufficient. *Ib.*
4. *Appeal Bond*.—*Principal and Agent*.—*Notice*.—Where to procure an appeal from a judgment rendered by the mayor of a city, the surety on the appeal bond entrusts the bond to the principal, the party appealing, for delivery, the principal becomes the agent of the surety; and the mayor, in accepting and approving the bond, becomes the agent of the opposite party to the judgment; and notice to the mayor is notice to such party of any defect or illegality in the delivery of the bond. *Allen v. Marney*, 398
5. *Same*.—*Bond Signed by Part only of Several Apparent Sureties*.—*Erasure*.—Where, in such case, a surety signs the bond, and entrusts it to the principal for delivery to the mayor only upon its being also signed by another whose name appears in the body of the bond as a co-surety, its delivery by the principal, without the knowledge or consent of the surety and without the signature of such co-surety, and its acceptance and approval by the mayor, do not render the surety liable. And the fact that the principal had erased the name of such surety before delivering the bond to the mayor does not alter this rule. *Ib.*
6. *Extension of Time*.—An agreement between the holder and principal, for an extension of the time of payment of a promissory note indefinitely, on payment of the interest, will not discharge the surety. *Miller v. Arnold*, 488
7. *Verbal Agreement to Sue*.—A violation by the holder, of a verbal agreement with the surety to at once sue the principal, will not discharge the surety. *Ib.*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

1. *Assignment for Benefit of Creditors*.—*Failure to Record Deed of*.—*Es-*

toppel.—Pleading.—Parties.—In a proceeding supplementary to execution under section 522, 2 R. S. 1876, p. 231, to reach property of the execution debtor alleged to be in the possession of a third person, the latter answered setting up a voluntary assignment to him by the debtor of all his property for the benefit of all his creditors, but the deed of assignment had neither been assented to by the execution creditor, nor had it been recorded.

Held, that the assignment was not binding upon such creditor, even though, after it was made, he had verbally assented thereto.

Held, also, that the statute does not contemplate pleadings in such proceeding as in ordinary civil actions.

Held, also, that the other creditors were neither necessary nor proper parties to the proceeding. *Eden v. Everson*, 113

2. *Affidavit by Attorney.*—The affidavit instituting such proceeding may be made on behalf of the creditor by his attorney. *Id.*

PROCESS.

See CITIES AND TOWNS, 1; DECEDENTS' ESTATES, 7, 8; LIQUOR LAW, 6; RAILROAD, 2; TIME, 3, 4.

PROMISSORY NOTE.

See CONTRACT, 3; CRIMINAL LAW, 5, 17; DECEDENTS' ESTATE, 10; EVIDENCE, 2, 4; JUDGMENT, 4; MANUFACTURING COMPANY; MORTGAGE, 1 to 3; PAYMENT; PRINCIPAL AND SURETY, 1 to 3, 6, 7.

1. *Open and Close.—Promissory Note.—Attorney's Fees.—Pleading.*—In an action upon a promissory note containing a stipulation for a reasonable attorney's fee, wherein the complaint demanded a certain sum, alleged to be reasonable, as the attorney's fee, the defendant, for the purpose of obtaining the right to open and close the cause, in which he had otherwise set up affirmative defences only, answered admitting that the plaintiff was entitled to recover, as an attorney's fee, a sum bearing the same proportion to the amount otherwise recovered, as the sum demanded therefor bore to the total amount of the note, on its face, at the commencement of the action.

Held, on demurrer, that the answer is insufficient, that the burden of proof is upon the plaintiff, and that he is entitled to the open and close.

Hyatt v. Clements, 12

2. *Principal and Agent.—Church Trustees.*—A promissory note in the form "we promise to pay," etc., executed by the makers in their individual names, with the addition of the words "Trustees of the," etc., "Church," is the note of the makers individually, and can not be varied by a defence involving parol evidence, shifting the liability to the makers as church trustees. *Hayes v. Brubaker*, 27

3. *Fraudulent Representations.—Counter-Claim.—Written Lease.—Landlord and Tenant.—Rescission.*—In an action by the payee, against the makers, a principal and surety, upon a promissory note executed in part consideration of a lease of real estate, made by the payee, to the principal, by a writing which was silent as to the character and condition of the real estate leased, the principal answered by way of counter-claim, setting out the lease, alleging the suretyship, and averring that the payee, in making such lease, had falsely and fraudulently represented to the principal that the real estate was so underdrained as to be fit for farming equally well in wet and dry seasons; that he had no means of ascertaining whether or not such representations were true, and, relying upon them, accepted the lease and executed the note; and that such representations were false, that a part of the lease was during a wet season, and that for want of underdraining his crops had failed.

Held, on demurrer, that the answer is sufficient as a counter-claim.

Norris v. Tharp, 47

4. *Mistake.—Burden of Proof.*—The burden of proof of an alleged mistake in a promissory note in suit is upon the party alleging the mistake ; and it must be shown to have been mutual. *Buck v. Steffey*, 58
5. *Notes Secured by Mortgage.—Foreclosure of All on Maturity of Part.—Complaint Against Endorser.—Negligence.—Excess on Execution Must be Paid to Judgment Debtor.*—The payee of several promissory notes maturing successively and secured by a mortgage on real estate endorsed them to one who, on maturity of part, foreclosed the mortgage, obtaining a finding and decree showing the amounts due and to become due, and the dates of maturity, and ordering the real estate to be sold without division, etc. He then exhausted the mortgaged premises, and all other property of the mortgagor, by execution, without satisfying the instalment already due, and, upon the maturity of the other instalments, he brought suit against the payee, as endorser, alleging the foregoing facts and also "the utter insolvency of the maker of the notes, at, before and after the maturity of " each instalment.
Held, on demurrer, that the complaint is sufficient without an averment of a return of *nulla bona*.
Held, also, that negligence in the collection of the amount found due on foreclosure is no defence to the action against the endorser for the instalments afterward maturing.
Held, also, that execution could not issue for the instalments not matured until they became due.
Held, also, that any money made on execution in excess of the instalments due must be paid to the judgment debtor, and can not be applied on instalments not matured. *Binford v. Willson*, 70
6. *Mortgage.—Action by Endorsee.—Counter-Claim by Payee Claiming Title.—Verdict.—Uncertainty.—Venire De Novo.*—In an action on a promissory note and to foreclose a mortgage securing it, brought by an endorsee against the mortgagors and a junior mortgagee, the payee of the note, on his own petition, was made a party, and filed a counter-claim alleging ownership of the note ; and, judgment having been rendered, by agreement of parties, in favor of the junior mortgagee, against the mortgagors, before verdict, the jury returned a verdict that the senior note and mortgage were the property of the payee, assessing his damages and finding that he was entitled to foreclosure.
Held, on motion by the plaintiff for a *venire de novo*, that the verdict is certain as to him, and that he can not complain of its uncertainty as to others. *Compton v. Jones*, 117
7. *Same.—Assignment of Note as Indemnity.—Payment of Debt by Assignor.—Rescission.*—The evidence on the trial in such action established, that the note in question had been endorsed by the payee to the plaintiff, simply to secure him against loss on account of debts of the payee which the plaintiff was assisting him to pay off, but that, before the commencement of the action, the payee had paid the same out of his own means.
Held, that, on such payment, the assignment was rescinded, and the note and mortgage reverted to the payee. *Ib.*
8. *Answer of Failure of Consideration.—Life Insurance.*—In an action by a life insurance company, as payee, against the makers, a principal and surety, on a promissory note, the defendants answered that the note in suit had been executed "in consideration of a valid paid-up life policy, to be issued and delivered to the" principal "by the plaintiff, and for no other or different consideration whatever ; that, although a reasonable time for the issuing and delivering of said policy * has long since elapsed, yet the plaintiff has wholly neglected and refused to execute and deliver * a valid life policy for the value of said note."
Held, on demurrer, that the answer, as a plea of either a partial or total failure of consideration, is insufficient. *Franklin L. Ins. Co. v. Cardwell*, 138

9. *Complaint by Endorsee against Endorser.—Diligence in Suing Maker.*—In an action by an endorsee, against an endorser, of a promissory note, the complaint alleged, that, immediately on the maturity of the note, at the first term of the court having jurisdiction, the plaintiff sued, procured due service of process on, and obtained judgment against, the maker, on the note.
Held, on demurrer, that the plaintiff used due diligence in suing the maker.
Williams v. Nesbit, 171
10. *Same.—Insolvency.—Surplusage.*—Where, in such action, the complaint alleges facts showing due diligence by the plaintiff in suing the maker, obtaining judgment, and issuing an execution which is returned *nulla bona*, any allegation of the insolvency of the maker is mere surplusage.
Ib.
11. *Same.—Dates.*—Such complaint should clearly specify the dates of the judgment and execution.
Ib.
12. *Same.—Evidence.—Proceeds of Bankrupt Maker's Estate.*—It is not competent for the defendant, under issue formed on such complaint, to prove that the estate of the maker in bankruptcy would pay a percentage of his debts.
Ib.
13. *Same.—Judgment.—Execution.—Case Distinguished.*—The judgment and execution against the maker are competent evidence against the endorser, and they can not be attacked collaterally. *McCormack v. The First National Bank, etc.*, 53 Ind. 466, distinguished.
Ib.

PROSECUTING ATTORNEY.

See CITIES AND TOWNS, 9.

PUBLICATION.

See CITIES AND TOWNS, 1 ; LIQUOR LAW, 6 ; TURNPIKE, 1.

QUO WARRANTO

See CITIES AND TOWNS, 9 ; INFORMATION.

RAILROAD.

See COMMON CARRIER ; SLEEPING CAR COMPANY.

1. *Killing Stock.—Fact Inferred from Evidence.—Supreme Court.*—Where, in an action against a railroad company, under the statute, for killing stock, there is evidence, that, at the time of the killing, the defendant owned and operated the railroad upon which the stock was killed, the court trying the cause might reasonably infer therefrom, in the absence of evidence to the contrary, that the locomotive and cars which struck and killed the stock were the property of the defendant ; and in such case the Supreme Court will not disturb a finding for the plaintiff merely for want of direct evidence of such ownership.
Evansville, etc., R. R. Co. v. Smith, 92
2. *Appropriation to.—Petition.—Notice.*—A petition to a board of commissioners to make an appropriation of money, by taxation of a certain township, to aid in the construction of a railroad, and also the notice of election, specified a certain sum, "or a sum equal to two per centum of all taxable property in said township," as the appropriation desired.
Held, that the amount of the appropriation is set out with sufficient certainty.
Williams v. Hall, 129
3. *Same.—Harmless Evidence.—Unassessed Property.*—On the trial of an action by a tax-payer to enjoin the collection of such tax, it appearing that the sum specified was exactly two per centum of the assessed taxable property of the township, it was harmless to allow evidence by the defendant of unassessed property subject to taxation in that township.
Ib.

4. *Same.—Cases Distinguished.—The Cincinnati, etc., R. R. Co. v. Wells*, 39 Ind. 539, and *The Detroit, etc., R. R. Co. v. Bearss*, 39 Ind. 598. *Ib.*
5. *Appropriation.—Order of County Commissioners in Special Session Illegally Convened.—Enjoining Collection of Tax Voted.*—An order made by a board of commissioners, at a special session not legally convened, granting the prayer of a petition for an election by the voters of a township upon a proposed appropriation to aid in the construction of a railroad, pursuant to the act of May 12th, 1869, 1 R. S. 1876, p. 736, is illegal and void; and the collection of a tax levied pursuant to such order and election may be enjoined at the suit of a tax-payer.
C. C. & I. C. R. W. Co. v. Beard of Comm'rs, 427
6. *Same.—Petition.—Amount of Appropriation Asked.*—Where the amount of the appropriation asked by such petition exceeds two per centum of the assessed value of the taxable property of the township, as shown by the tax duplicate of the preceding year, the levy and assessment of a tax pursuant thereto are illegal and void, and the collection thereof may be enjoined at the suit of a tax-payer. *Ib.*
7. *Same.—Lessor and Lessee.—Parties.*—The collection of taxes assessed in either of such cases upon a railroad belonging to one, and by it leased to another, railroad company, under an agreement that all taxes legally assessed on such property, and paid by the lessee, should be chargeable against the lessor, may be enjoined in an action by the lessor. *Ib.*
8. *Same.—Curative Act.—Constitutional Law.*—In an action by the C. C. & I. C. R. W. Co., against the Board of Commissioners of Grant county, the county treasurer and the C. W. & M. R. R. Co., to enjoin the collection of taxes assessed upon the property of the plaintiff as part of an appropriation voted by the voters of Mill township in said county, pursuant to a petition asking an appropriation of a sum exceeding two per centum of the assessed value of the taxable property of such township, filed, and ordered to be voted on, at a special session of such board illegally convened, the original complaint was filed and summons issued before, but the amended complaint was filed after, the passage of the act of February 3d, 1877, Acts 1877, Reg. Sess., p. 113, legalizing the acts of such board of commissioners therein.
Held, on demurrer to the amended complaint, that the Legislature in passing, and the Governor in approving, such act, invaded the province of the judiciary, and that, therefore, such act is unconstitutional and void. *Ib.*
9. *Appropriation by Township.—Enjoining Tax.—Parties.*—In an action by a tax-payer, against a county treasurer, to enjoin the collection of a tax levied as an appropriation voted by a township to aid in the construction of a railroad, the township is a necessary party defendant, but the railroad company and the board of county commissioners are not; and neither are the petitioners for the appropriation where their interests are not affirmatively shown by the complaint to be adverse to the plaintiff.
Bittinger v. Bell, 445
10. *Same.—Amendment in Proceedings of County Commissioners.*—Any error in the proceedings before the board of county commissioners to secure such appropriation must be amended, if amendable at all, by the board, on application made to it as such, and can not be made in or by the circuit court, in such action for an injunction. *Ib.*
11. *Same.—New Parties Defendants.—Tax-Payer of Township.*—A tax-payer of the township, alleging himself to be in favor of the appropriation as made, and that the defendant is not a tax-payer of such township, should, on proper application, be allowed to appear, answer to and defend such action. *Ib.*
12. *Same.—Appropriation by Township on Condition.—Case Distinguished.*—In a proceeding under the act of May 12th, 1869, 1 R. S. 1876, p. 736,

- a condition contained in the petition and notice of election, that the appropriation should be made, and stock taken, by the township, only in case of the location and construction, by the railroad company, of a depot at a certain point, is valid. *The Indiana, etc., R. W. Co. v. The City of Attica*, 56 Ind. 476, distinguished. *Ib.*
13. *Same.—Levy of Tax.—Informality not Fatal.*—The fact that the county commissioners, on being duly informed that such appropriation had been voted by such township, entered of record an order granting the prayer of the petition, and levying the whole of the appropriation as a tax, but extending on the duplicate, for collection during the current year, a lawful part only thereof, and deferring the residue until the succeeding year, does not invalidate the same. *Ib.*
14. *Same.*—If an order by a board of commissioners is substantially right, it is not rendered invalid by mere informality. *Ib.*
15. *Common Carrier of Passengers.—Negligence.*—A passenger upon a railroad train takes all the risks attending that mode of travel, except such as are caused or increased solely by the negligence of the carrier. *G. R. & I. R. R. Co. v. Boyd*, 526
16. *Same.*—A common carrier is an insurer of the passenger's safety only against the risks caused or increased solely by its own negligence. *Ib.*
17. *Same.—Extent of Negligence.*—The negligence for which the carrier is liable includes negligence concerning the condition of its road, the character of its machinery, the quality of its cars, the sufficiency of its equipments, the skill and conduct of its agents and employees, and every other thing necessary to the safety of a passenger who himself is not at fault. *Ib.*
18. *Same.—Action by Passenger for Injury.—Answers to Interrogatories.—Verdict.*—In an action against a railroad company, by a passenger, for injuries received through the alleged negligence of the defendant in employing an incompetent engineer and defective machinery, in suffering the road to be out of repair and in running the train recklessly, thereby wrecking the train carrying the plaintiff, the jury, with their general verdict for the plaintiff, found specially, that, at a point on the defendant's road where the ties were bad and the rails short, because of a flaw, discoverable by a practicable test, in an axle of one of the trucks of the tender, such axle broke, throwing the train on which the plaintiff was riding from the track, thereby injuring him.
- Held*, that such finding supports, but is no stronger than, the general verdict. *Ib.*
19. *Same.—Judgment Non Obstante.*—Such jury also found specially, that, three months previous to the accident, such axle had been "tested * by the best approved methods in use" and had been duly inspected just before the train left on the trip during which the accident occurred; that the flaw could not have been detected; that the axle had been made by a good and reputable manufacturer; that the train, at the time of the accident, was running at a safe rate of speed; that the road was in ordinary condition; and that no act of negligence "in particular" had been committed by the defendant, or by any of its agents or employees "in particular."
- Held*, that the defendant was entitled to judgment notwithstanding the verdict. *Ib.*

RAPE.

See CRIMINAL LAW, 26.

RATIFICATION.

See CONTRACT, 6.

REAL ESTATE, ACTION TO RECOVER

See FRAUDULENT CONVEYANCE; MORTGAGE, 4; PRACTICE, 10.

1. *Improvements.—Special Denial of.—Demurrer.*—In an action to recover possession of real estate, wherein the defendant answered claiming an allowance for improvements, the plaintiff replied by general denial, and also by a special paragraph averring "that the defendant never made the improvements" alleged "while he was in possession * as owner, after he had executed the mortgage under which upon a sale on foreclosure, the plaintiff claims title and in no other way," etc.
Held, that such special paragraph is a special denial, and not open to demurrer. *Osborn v. Storms*, 321
2. *Same.—Evidence.—Transcript of Decree of Foreclosure.—Return Day.*—A transcript of such decree of foreclosure and order of sale is competent evidence in such case, though no return day be specified therein, as by law that day is fixed by the day the transcript goes into the sheriff's hands. *Ib.*
3. *Same.—Improvements After Sale.*—The defendant in such case can not give evidence of improvements made by him subsequent to the sale of the real estate by the sheriff. *Ib.*
4. *Same.—Improvement by Direction of Plaintiff's Attorney.—Agency.—Redemption.*—Evidence that such improvements were made at the request of the plaintiff's attorney, in consideration of an extension of the time of redemption, is incompetent, unless accompanied by direct proof that the attorney had authority to make such request. *Ib.*
5. *Same.—Judgment can not be Attacked Collaterally.*—Such decree can not be attacked collaterally by evidence that the plaintiff in the foreclosure suit was not the owner of the note and mortgage sued on by him. *Ib.*
6. *Supreme Court.—Record.—Trial on Substituted Complaint.—Special Finding.*—The record, in the Supreme Court, of an action to recover real estate, showed a trial of the cause by the court, upon the issues formed upon the original complaint, but that, without any finding having been made, a substituted complaint and an answer thereto were filed; that trial was had and judgment rendered thereon for the defendant; and that, on a new trial as of right, by the court, a general and a special finding were made, and judgment rendered by the court, for the defendant.
Held, that the original complaint and answer, though copied into the transcript, form no part of the record.
Held, also, neither the substituted complaint, the answer thereto, nor the evidence being in the record, that the Supreme Court can not say that the special finding was not within the issues. *Britz v. Johnson*, 561
7. *Same.—Purchase Pendente Lite.—Presumption.*—One fact of such special finding being that the plaintiff had purchased the real estate in question at a sheriff's sale thereof, made after the filing of the complaint and the issue of process in an action by this defendant, against a third person, to recover such real estate, resulting in a judgment for the former, the Supreme Court is bound to presume, in the absence of any thing in the record to the contrary, in favor of the finding and judgment below. *Ib.*

RECEIPT.

See JUDGMENT, 1 to 3.

RECEIVER.

See INFORMATION, 1.

RECORD.

See BILL OF EXCEPTIONS; CONTEMPT, 2 to 4; CRIMINAL LAW, 4, 11, 12, 15;

NEW TRIAL, 1; NUISANCE, 8; NUNG PRO TUNG ENTRY, 8; PRACTICE, 1, 5, 9; REAL ESTATE, ACTION TO RECOVER, 6; SUPREME COURT, 1, 7, 17.

RECORDING INSTRUMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; MORTGAGE, 5; PROCEEDINGS SUPPLEMENTARY.

REDEMPTION.

See CONTRACT, 8; DECEDENTS' ESTATES, 3, 4; REAL ESTATE, ACTION TO RECOVER, 4; VENDOR'S LIEN.

REFORMING WRITTEN INSTRUMENT.

See MISTAKE.

REINSTATING APPEAL.

See DECEDENTS' ESTATES, 7 to 9.

RELATOR.

See CONTESTED ELECTION, 1; GUARDIAN AND WARD, 2, 6; MORTGAGE, 1; TOWNSHIP TRUSTEE, 1.

RELEASE OF ERRORS.

See TIME, 4.

RELEASE OF LEVY.

See CONTRACT, 5; PLEADING, 1; PROMISSORY NOTE, 4.

REMEDY.

See CITIES AND TOWNS, 6, 9; COVENANT, 3; MORTGAGE, 4.

RENTS.

See DECEDENTS' ESTATES, 10, 11.

REPEAL OF STATUTE.

See CRIMINAL LAW, 19; TIME, 1.

REPLEVIN.

See WITNESS.

Justice of the Peace.—Assessment of Value Exceeding that Alleged.—Verdict.—Amendment of Complaint.—On trial in the circuit court, on appeal by the plaintiff, of an action commenced before a justice of the peace, to recover the possession of a chattel alleged in the complaint to be of the value of twenty-five dollars, the jury returned a verdict that the plaintiff was the owner and entitled to the possession of the chattel, that it was of the value of sixty-five dollars, and that it was unlawfully detained by the defendant.

Held, that, if the property be adjudged to the plaintiff, and is not returned or cannot be found, he is entitled to judgment for the value thereof whether demanded by the complaint or not.

Held, also, that the fact that the value assessed by the verdict exceeds that alleged in the complaint is not cause for a new trial.

Held, also, that the Supreme Court will deem the complaint to have been so amended as to correspond with the verdict. *Singer Mfg. Co. v. Dozey*, 65

REPLEVIN BAIL.

See TRUSTS.

Stay of Execution beyond Six Months.—Failure of Co-Recognisor to Sign.—The attorney of the judgment creditor having proposed to the judgment debtor to stay execution on a judgment for fifteen months, if the latter

would procure certain persons to execute the necessary recognizance, and such recognizance, in the form "We," naming the bail proposed, "hereby acknowledge ourselves replevin bail," etc., having been prepared, was signed by one of the recognizers only, to become operative when signed by the other; but it was never either signed by the latter or approved by the clerk.

Held, that the recognizance never became operative. *McKinley v. Snyder*, 143

REPORT.

See GUARDIAN AND WARD, 4; TOWNSHIP TRUSTEE, 4;

RESCISSION.

See PROMISSORY NOTE, 8, 7.

RETURN DAY.

See REAL ESTATE, ACTION TO RECOVER, 2.

REVIEW OF JUDGMENT.

Complaint.—Partition upon Award of Arbitrators.—Arbitration and Umpirage.—In an action for the review of a judgment rendered in an action for partition, it appeared affirmatively by the record filed with the complaint for review, that the judgment sought to be reviewed had been rendered, over a demurrer for insufficiency and an exception, on a paragraph of the complaint for partition, counting upon a statutory award by arbitrators; but it did not appear by the record that the award and agreement of submission had ever been filed in the court named in such submission, nor that the submission and award had been proved, nor that proof had been made of due service of a copy of the award, nor that the proper court had caused such submission and award to be entered of record, and had granted a rule to show cause why judgment should not be rendered upon the award, nor that the award had ever been confirmed by the judgment of the proper court.

Held, on demurrer to the complaint for review, that it is sufficient, that such paragraph of the complaint for partition was insufficient, and therefore that the judgment rendered thereon should be reviewed and reversed.

Anderson v. Anderson, 196

REVIVOR.

See VENDOR'S LIEN.

RIOT.

See COMMON CARRIER, 8 to 5.

ROBBERY.

See CRIMINAL LAW, 17.

SATISFACTION OF JUDGMENT.

See CONTRACT, 5; COVENANT, 4; JUDGMENT, 1 to 3.

SEDUCTION.

1. *Complaint.*—In an action under sec. 24, 2 R. S. 1876, p. 48, for seduction, the complaint must allege that the plaintiff is an "unmarried female."

Galvin v. Crouch, 56

2. *Same.—Common Law.*—Such action did not exist at common law. *Ib.*

3. *Same.—Statute Construed.*—The complaint in an action under sec. 24, 2 R. S. 1876, p. 48, for seduction, should affirmatively allege, that, at the time of the seduction charged, the plaintiff was an "unmarried female."

Dowling v. Crapo, 209

4. *Same.—Subsequent Marriage.*—The marriage of the plaintiff, subsequent to her seduction, to a person other than the defendant, is no bar to the action. *Ib.*

5. *Same.—Arrest of Judgment.*—Where, though not affirmatively alleged in the complaint, the reasonable inference from the facts therein alleged is, that the plaintiff, at the time of the seduction charged, was "unmarried," the complaint is sufficient, after verdict for the plaintiff, on motion in arrest. *Id.*

SET-OFF.

See DECEDENTS' ESTATES, 10.

SEWER.

See CITIES AND TOWNS, 2 to 6.

SHERIFF'S SALE.

See CONTRACT, 8; DECEDENTS' ESTATES, 3, 4; EVIDENCE, 5; FRAUDULENT CONVEYANCE; HEIRS; MISTAKE; MORTGAGE, 4; REAL ESTATE; TRUSTS; VENDOR'S LIEN.

Sale in solido.—Land Susceptible of Division.—A sheriff's sale in *solido* of lands susceptible of sale in parcels can not ordinarily be upheld.

Whisman v. Small, 120

SLEEPING-CAR COMPANY.

1. *Passenger.—Sleeping-Car Berth.—Ticket.—Change of Cars.—Action for Damages.*—A passenger purchased, of a corporation engaged in furnishing sleeping cars for the use of passengers over a certain continuous line of railroads, a ticket purporting to entitle him to accommodations between certain stations, in a certain sleeping car, and in a berth to be designated on the ticket, by the conductor of such car, in the manner directed by the ticket. Upon entering that car at the starting-point, a certain berth was assigned to him, and designated on the ticket, in the manner provided by it, by the conductor, but, before arriving at his destination, such car was removed from the train by the defendant, and a different berth in a different sleeping car was offered to him, which he refused, and sued such corporation for a breach of its contract.
Hehl, that, by the contract evidenced by the ticket, the passenger was entitled to a continuous passage in such berth, on such car, or in an equally desirable berth on an equally safe, convenient and comfortable sleeping car.
Pullman Palace Car Co. v. Taylor, 153
2. *Same.—Defence.—Contract between Sleeping-Car Company and Railroad Company.*—An answer in such action, alleging that the defendant had simply furnished such car to the railroad companies, for the use of passengers, for a certain rent, pursuant to a contract between it and such companies, but admitting that the change of cars was made as alleged in the complaint, is insufficient. *Id.*

SPECIAL FINDING.

See FEES AND SALARIES, 8; MORTGAGE, 4; NEW TRIAL, 5; RAILROAD, 18, 19; REAL ESTATE, ACTION TO RECOVER, 6.

SPECIAL VERDICT.

See FRAUDULENT CONVEYANCE.

SPECIFIC PERFORMANCE.

See SUPREME COURT, 10.

STATUTE 21 H. III.

See TIME, 2.

STATUTE CONSTRUED.

See CONTEMPT, 6; DECEDENTS' ESTATES, 9; FEES AND SALARIES, 2, 5, 7; JUDGMENT, 3; LIQUOR LAW, 6; MANUFACTURING COMPANY; PARTIES; SEDUCTION, 1, 8; TURNPIKE, 2.

STATUTE OF LIMITATIONS.

See HEIRS; INFORMATION, 3; PAYMENT, 1.

STAY OF EXECUTION.

See REPLEVIN BAIL.

STOCKHOLDER.

See MANUFACTURING COMPANY; TURNPIKE.

STREET.

See CITIES AND TOWNS, 1; CRIMINAL LAW, 19.

"STRIKE."

See COMMON CARRIER, 3 to 5.

SUBSCRIBING WITNESS.

See EVIDENCE, 7.

SUBSCRIPTION.

See TURNPIKE.

SUMMONS.

See PROCESS.

SUNDAY.

See CITIES AND TOWNS, 1.

SUPERSEDEAS.

See DECEDENTS' ESTATES, 6.

SUPERVISOR.

See CRIMINAL LAW, 19; NEGLIGENCE.

SUPREME COURT.

See BASTARDY, 3, 4; CONTEMPT, 5; CRIMINAL LAW, 4, 11, 12, 14, 25; DECEDENTS' ESTATES, 5; EVIDENCE, 8; FEES AND SALARIES, 1; HEIRS; LAW OF THE CASE; NEW TRIAL, 1, 2, 6; NUISANCE, 3; PRACTICE, 5, 7, 9, 11, 12; RAILROAD, 1; REAL ESTATE, ACTION TO RECOVER, 6; REPLEVIN.

1. *Objection to Evidence.—Record.—New Trial.*—Where the record, on appeal, does not show that the grounds of an objection made to the admission of evidence were stated to the court where it was made, it will not be considered by the Supreme Court. *Hyatt v. Clements*, 12
2. *Same.—Truth of Error Alleged.—Bill of Exceptions.*—Where the truth of matter alleged as cause for a new trial does not appear by a bill of exceptions, the Supreme Court will not consider it. *Ib.*
3. *Appeal.—Notice.—Dismissal.*—An appeal to the Supreme Court, by one only of several co-parties, without giving notice to the others, will be dismissed. *Cranmore v. Bodine*, 25
4. *New Trial.—Bill of Exceptions.*—The truth of causes alleged in a motion for a new trial must be shown by a bill of exceptions. *Fisher v. The State, ex rel.*, 51
5. *Same.—Assignment of Error.*—A mere cause for a new trial can not properly be assigned as error, in the Supreme Court. *Ib.*
6. *Weight of Evidence.*—The Supreme Court will not disturb a finding upon the mere weight of evidence. *Buck v. Steffey*, 58
7. *Motion.—Exception.—Record.*—A motion for a judgment *non obstante*, and an exception to the ruling thereon, are parts of the record. *Monroe v. Adams Ex. Co.*, 60

8. *Weight of Evidence.—Case Criticised.*—The Supreme Court will not disturb a verdict on the mere weight of the evidence. *The Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 186, criticised.
Ft. W., J. & S. R. R. Co. v. Husselman, 78
9. *Same.*—The Supreme Court will not disturb a finding on the mere weight of the evidence.
E. & C. R. R. Co. v. Smith, 92
10. *Appeal after Receiving Payment on Judgment.—Dismissal of.—Specific Performance.—Tender.*—In an action to enforce the specific performance of a contract to convey real estate, wherein, to keep good his tender thereof, the plaintiff paid into court a certain sum of money for the defendant, the court found, that, to entitle the plaintiff to a decree, he must pay into court, for the defendant, an additional sum, which he did, and obtained his decree. And the defendant having received the aggregate of such sums, less the costs of the action, appealed to the Supreme Court.
Held, that the case falls within section 550, 2 R. S. 1876, p. 238, and that the appeal should therefore be dismissed. *Patterson v. Rowley*, 108
11. *Removal of Brief.*—Where the brief of an appellant has been removed from the files of the Supreme Court, and, on due and reasonable notice, he fails to return it or file another, the judgment will be affirmed.
Lent v. First Nat'l Bank, etc., 112
12. *Brief.—Waiver of Error.*—Error which is not discussed in the Supreme Court, in the brief of the party assigning it, is waived. *Williams v. Nesbit*, 171
13. *Weight of Evidence.*—The Supreme Court will not disturb a finding on the mere weight of the evidence.
Atherton v. Allen, 240
14. *Judgment of.—Petition for Rehearing.*—The action of the Supreme Court upon a petition for a rehearing is the action, not of any single judge thereof, but of the court as a unit.
Marshall v. Stewart, 243
15. *Waiver of Error.*—An assignment of error in the Supreme Court is waived by the failure of the party assigning it to discuss it in his brief.
Osborn v. Storms, 321
16. *Variance.—Amendment.*—A variance between an immaterial allegation in the complaint and the answer to an interrogatory relating thereto will be deemed, in the Supreme Court, to have been amended below.
Scheible v. Law, 332
17. *Evidence.—New Trial.*—Where, on appeal to the Supreme Court, the evidence is not all in the record, no question is presented as to whether or not the evidence sustains the verdict.
Ib.
18. *Refusal to Strike Out.*—Error in refusing to strike out parts of a pleading is not available in the Supreme Court.
Ib.
19. *Appeal without Notice to Co-Party.—Assignment of Errors.—Dismissal of.*—A judgment having been rendered against a principal and surety jointly, the latter, without giving notice to the former, appealed to the Supreme Court and assigned errors in the names of both, whereupon the principal, by affidavit denying notice of the appeal, moved to strike from the record his name and pretended assignment of errors.
Held, that the motion should be sustained, but that that does not affect the surety's appeal. *Miller v. Arnold*, 488
20. *Same.—Bill of Exceptions.—Motions to Strike Out, and to Paragraph.—Bill of Particulars.*—Unless made part of the record by a bill of exceptions, no question is presented to the Supreme Court as to the action of the lower court in overruling motions for an order to paragraph the complaint, to strike out parts thereof, and for a bill of particulars thereto.
Nichols v. The State, ex rel., 512
21. *Same.—Demurrer for Misjoinder of Actions.—Harmless Ruling.*—An erroneous ruling upon a demurrer for a misjoinder of causes of action is not available to reverse a judgment.
Ib.

SURETY OF THE PEACE.

Recognizance to Answer.—Complaint for Breach by Assault on Third Person.

—In an action by the State, against the principal and surety, on a recognizance, the complaint alleged that the "prosecuting attorney * now gives the court here to understand and be informed," that, on, etc., at, etc., in a proceeding for surety of the peace, instituted against the principal, in the name of the State on the relation of an affiant, before a justice of the peace, the principal had been required to and did enter into a recognizance, made part of the complaint by copy, with his codefendant as surety, in a certain sum each, to the State, to appear on the first day of the next term of the circuit court to answer in such cause, "and abide the order of such court therein, and in the mean time keep the peace toward all inhabitants of this State;" and that thereafter, but prior to the first day of such term of court, the principal had committed an assault and battery upon a certain third person, and had been prosecuted, and on his own confession convicted therefor. Wherefore, etc.

Held, on separate demurrers by the principal and surety, that the complaint though informal, is sufficient. *The State v. Rudowsky*, 389

SURPLUSAGE.

See NUISANCE, 1; PROMISSORY NOTE, 10.

SURPRISE.

See PRINCIPAL AND SURETY, 3.

TAX.

See RAILROAD, 2 to 14.

TAX TITLE.

See DECEDENTS' ESTATES, 4.

Interest on Taxes Paid by Holder.—Under section 257 of the act of December 21st, 1872, 1 R. S. 1876, p. 72, relating to the assessment of taxes, the holder of an invalid tax title is entitled to interest at the rate of twenty-five per cent. per annum on all taxes paid by him on the lands covered by the tax title. *Duke v. Brown*, 25

TENDER.

See SUPREME COURT, 10.

TIME.

See BASTARDY, 5; CITIES AND TOWNS, 1; CRIMINAL LAW, 5.

1. *29th of February in Leap-Year.—Repeal of Statutes.*—Section 57 of the practice act of January 30th, 1824, R. S. 1824, p. 299, providing "That in every leap-year, the 28th and 29th days of February shall be considered in law as one day," which was re-enacted by section 52 of the practice act of January 29th, 1831, R. S. 1831, p. 409, and again in R. S. 1838, p. 454, was repealed by section 4 of chapter 59, R. S. 1843, p. 1023, and has not since been in force in this State.

Helphenstine v. Vincennes Nat'l Bank, 582

2. *Same.—Statute of 21 H. III.—Cases Overruled.*—The statute of 21 Henry III. makes no provision as to how the 28th and 29th days of February in a leap-year shall be considered in computing periods of less than a year. *Swift v. Tousey*, 6 Ind. 196, *Craft v. State Bank*, 7 Ind. 219, *Kohler v. Montgomery*, 17 Ind. 220, and *Porter v. Holloway*, 43 Ind. 35, overruled. *Ib.*
3. *Same.—Process.—Service of Summons.*—The 29th day of February constitutes a day separate from the day preceding; and therefore service of a summons on the 25th day of such month, in a cause in a term of court commencing on the 6th day of March succeeding, is sufficient. *Ib.*
4. *Same.—Judgment on Insufficient Service.—Release of Errors.—Waiver.*

—A judgment rendered upon a nine days' service of summons, though reversible, on appeal, for insufficient service, is valid; and such service is cured by a release of errors and waiver of irregularities. *Ib.*

TITLE BOND.

See COVENANT, 5.

TORT.

See DECEDENTS' ESTATES, 10, 11.

TOWNSHIP.

See RAILROAD, 9 to 14.

TOWNSHIP TRUSTEE.

1. *Action on Bond.—Relator.—County Superintendent.*—Section 7 of the amendatory act of March 8th, 1878, Acts 1878, p. 79, and 1 R. S. 1876, p. 816, authorizes the proper county superintendent, in specified cases, to institute actions, on his own relation, on the bond of a defaulting township trustee, but does not confer that right upon him to the exclusion of such trustee's successor. *Nichols v. The State, ex rel., 512*
2. *Same.*—The successor of a defaulting township trustee is a proper relator in an action on the bond of the latter. *Ib.*
3. *Same.—Complaint.—Approval of Bond.—Demand.*—In an action on the bond of a deceased defaulting township trustee, the complaint set out the bond as an exhibit, which showed upon its face that it had been executed and acknowledged before, and approved by, the county auditor and had been duly recorded. The breaches alleged were a conversion of, and a failure to pay over, certain funds specifically alleged to have come into his hands, as such trustee.
Held, on demurrer, that no special demand was necessary, and that the bond had been executed, acknowledged, approved and recorded in accordance with the statute. *Ib.*
4. *Same.—Evidence.—Report.—Principal and Surety.*—A report made by a defaulting trustee to the county commissioners is admissible in evidence against, but is not conclusive upon, his estate or his sureties. *Ib.*

TRESPASS.

See CRIMINAL LAW, 18.

TRIAL.

See PRACTICE, 2, 14.

TRUSTS.

See INFORMATION, 8; PAYMENT, 8.

1. *Resulting Trust.—Conveyance to Husband, of Land Purchased by Wife.—Replevin Bail.—Sheriff's Sale.*—A tract of land was purchased and paid for by a married woman, but, though she intended to take the title in her own name, the deed was made, in her absence, to her husband, who, three years after, became replevin bail upon a judgment in the circuit court of the county in which the land was situated; and, upon the expiration of the stay, execution was issued upon such judgment and levied on such land, which was sold by the sheriff, on such execution, to the execution creditor, neither he nor the clerk of the court having notice of the interest of the wife.
Held, that the resulting trust in favor of the wife falls within section 2 of the act concerning trusts, 1 R. S. 1876, p. 915, and therefore that the rights of the purchaser must prevail. *Catherwood v. Watson, 576*
2. *Same.—Notice.*—Vague rumors of the facts constituting such trust, communicated by third persons to the attorney of the execution creditor, are not sufficient to charge the latter with notice of the trust. *Ib.*

TURNPIKE.

1. *Complaint for Stock Subscription.—Averment that Subscription is Due.—Notice by Publication.—Demand.—Cured by Verdict.*—In an action by a turnpike company, to collect stock subscribed to it by the defendants and payable "in such instalments, and at such times, as the company may direct," the complaint alleged that the company ordered "that the subscription" should be paid "in three equal instalments, in thirty, sixty and ninety days from June 1st, 1872," and that "said plaintiff demanded payment of" such subscription "of said defendants, on the 1st day of April, 1874, with which demand said defendants refused to comply. Wherefore," etc.

Held, on assignment questioning the sufficiency of the complaint, that its averments sufficiently allege the subscription to be due and unpaid, and that it was not necessary to allege either demand, or the publication required by section 11, 1 R. S. 1876, p. 658.

Beckner v. Riverside, etc., T. P. Co., 468

2. *Same.—Defence.—Alteration of Route.—Statutes Construed.*—An answer in such action alleged, that, after the signing of the company's articles of association, the company had altered the line of its road specified in such articles, between the *termini*.

Held, on demurrer, that the company had power to change the route of their road to avoid obstacles and obtain the best route, except as to its *termini* and general direction, and that, therefore, the answer is insufficient. *Ib.*

3. *Same.—Construction of Written Evidence.—Instruction to find for a Party Named.*—The only evidence given on the trial of such cause by the plaintiff being contained in written instruments fixing a *prima facie* liability on the defendants, and they having introduced no evidence tending to prove a defence, it was not erroneous to instruct the jury to "find for the plaintiff, for the amount of the subscription, less any payments which may be proven, because the variations proven are immaterial." *Ib.*

ULTRA VIRES.

See MORTGAGE, 2, 6.

UNCERTAINTY.

See NUISANCE, 8 ; PROMISSORY NOTE, 6.

VARIANCE.

See CRIMINAL LAW, 5, 10, 26 ; SUPREME COURT, 16.

VENDOR AND PURCHASER.

See COVENANT ; FRAUD, 2.

VENDOR'S LIEN.

Sale by Commissioner in Partition.—Foreclosure for Purchase-Money.—Decree.—Judgment.—Appraisement.—Sheriff's Sale on Certified Copy, Issued after Death of Debtor.—Revivor.—Complaint by Heirs, to Redeem.—Certain tracts of land having been sold, and certificates of purchase issued, severally, to purchasers, by a commissioner in partition, and one of the purchasers having obtained assignments of the certificates of the others, the commissioner obtained a judgment against him for the unpaid balance of the purchase-money, and a decree of foreclosure, subject to appraisement ; and, the judgment debtor then dying, the real estate was sold at sheriff's sale, to a third person, for the sum necessary to satisfy such decree and costs, and a sheriff's deed was duly made, on a certified copy of such decree, issued subsequent to the decease of the debtor. The heirs of the debtor then sued the sheriff's grantee, seeking to redeem, or to obtain a decree for the purchase-money paid by the decedent setting out in their complaint, the record of such proceedings, alleging the foregoing facts, and averring that such sale

was invalid.

Held, on demurrer to the answer, carried back to the complaint, that such record forms no part of the complaint, which is insufficient.

Held, also, that, in such case, sale upon the certified copy of the decree was proper, that it was not necessary to revive the decree against the heirs, and that it was properly issued after such decease.

Held, also, that an averment that the sale was invalid because "no valid appraisalment had been made" is an averment of a conclusion of law.

Held, also, that the heirs were not entitled to either form of relief sought.

Held, also, that, though there may have been erroneous rulings, adverse to the plaintiffs, upon demurrer to the answer, and on the trial, yet, as the complaint was insufficient, judgment against them was proper.

Kellogg v. Tout, 146

VENIRE DE NOVO.

See PROMISSORY NOTE, 6.

VENUE.

See BASTARDY, 8.

VENUE, CHANGE OF.

See PRACTICE, 11.

VERDICT.

See CRIMINAL LAW, 1, 22, 24; INSTRUCTION, 2; PROMISSORY NOTE, 6;
RAILROAD, 18, 19; REPLEVIN; TURNPIKE, 1.

WAIVER.

See INSTRUCTION, 1; LIFE INSURANCE, 1; PRACTICE, 2, 13; SUPREME COURT, 12, 15; TIME, 4.

WARRANTY.

See COVENANT.

WATERCOURSE.

See NUISANCE.

WEIGHT OF EVIDENCE.

See INSTRUCTION, 6; SUPREME COURT, 6, 8, 9, 13.

WHARF-BOAT.

See FIRE INSURANCE.

WIDOW.

See LIFE INSURANCE, 5 to 11; MORTGAGE, 7.

WILL.

See EVIDENCE, 5.

WITNESS.

See BASTARDY, 8; PARTITION; PAYMENT, 1.

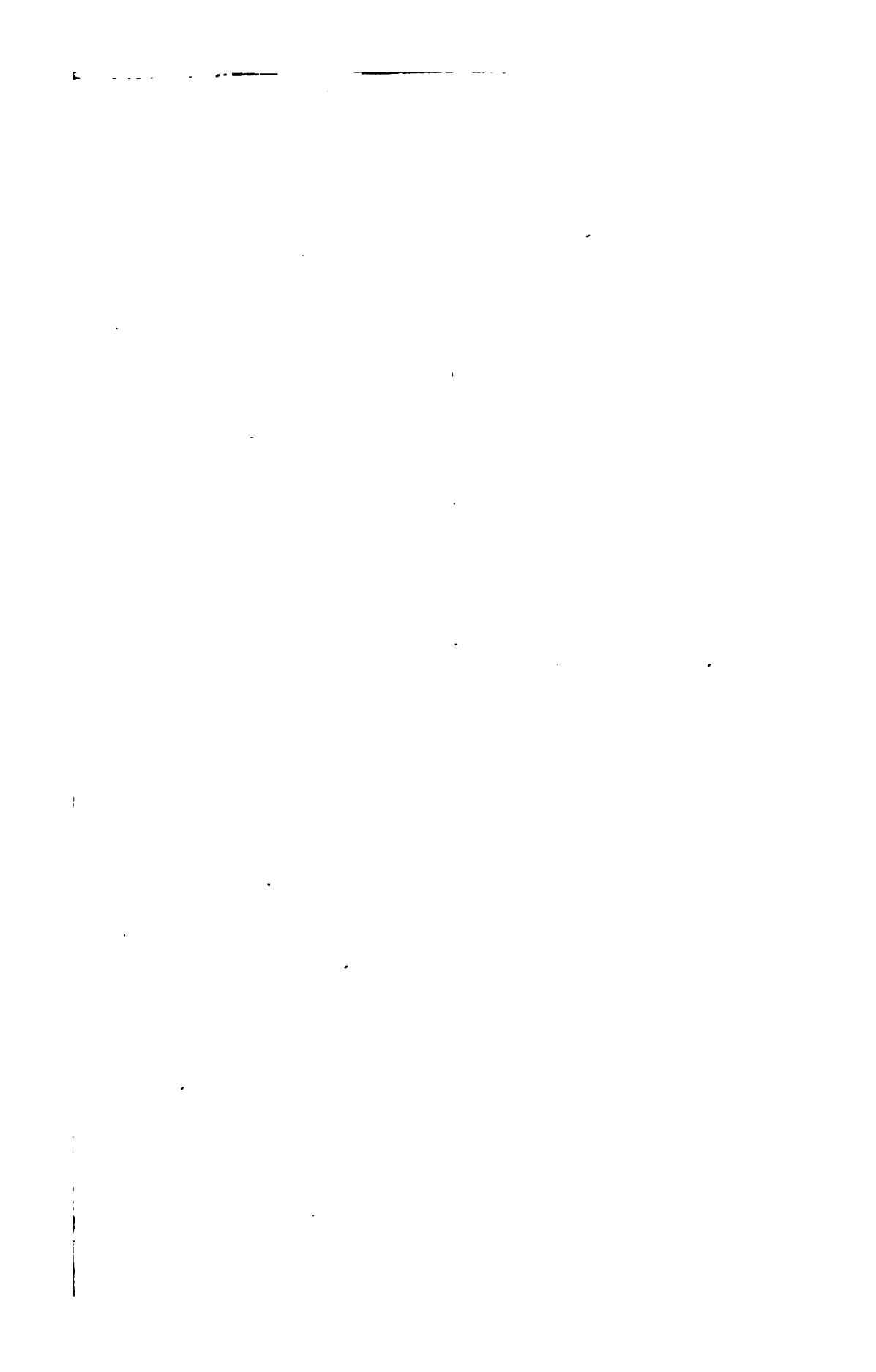
Conversation with Decedent.—Replevin.—Where a co-plaintiff in an action of replevin dies without having made a deposition, and his administrator is substituted as a co-plaintiff, the defendant is not a competent witness, in his own behalf and on his own motion, to testify to a conversation had between himself and the decedent, in relation to the title to the property in controversy.

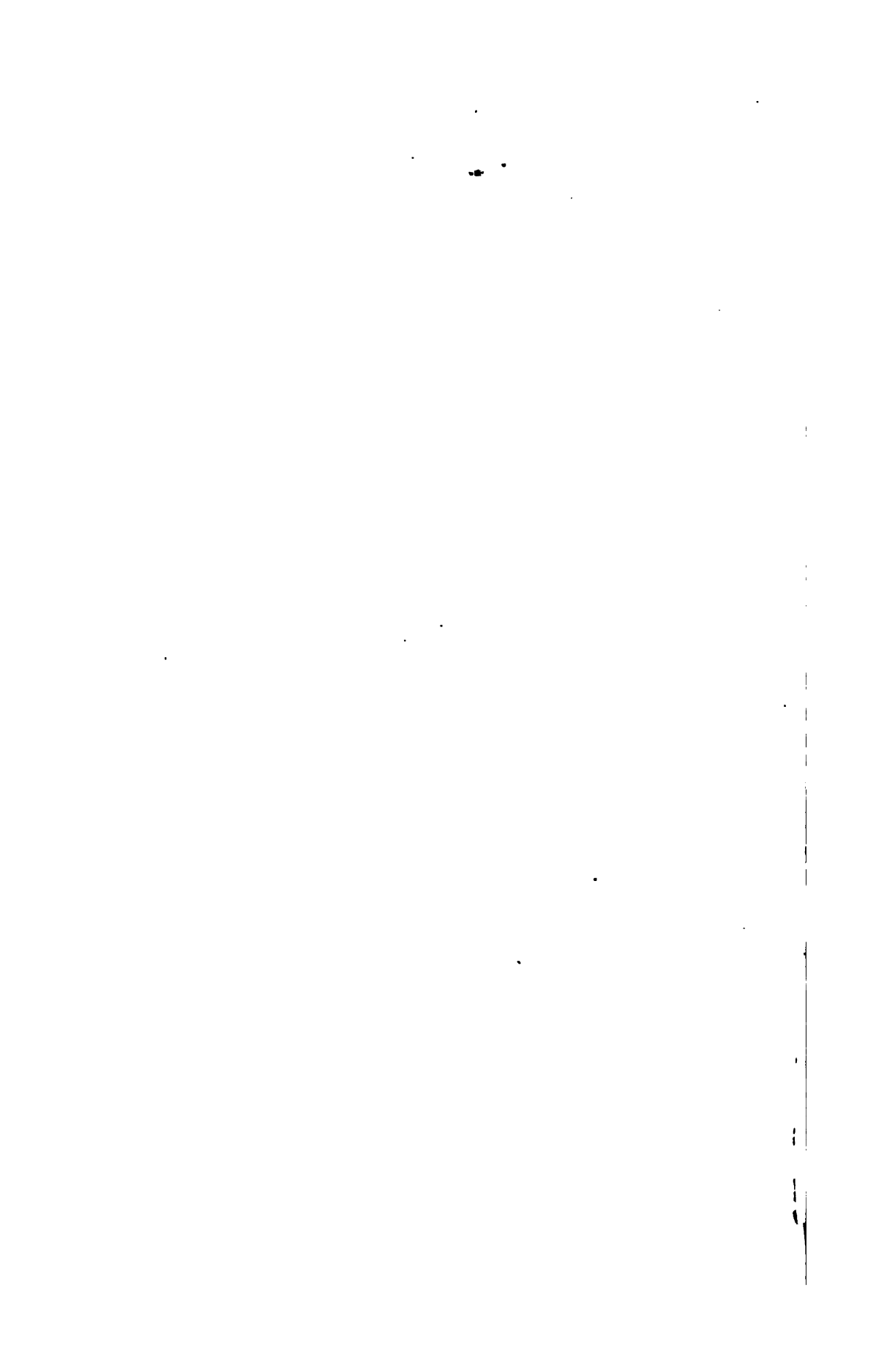
Charles v. Malott, 184

END OF VOL. LXV.

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